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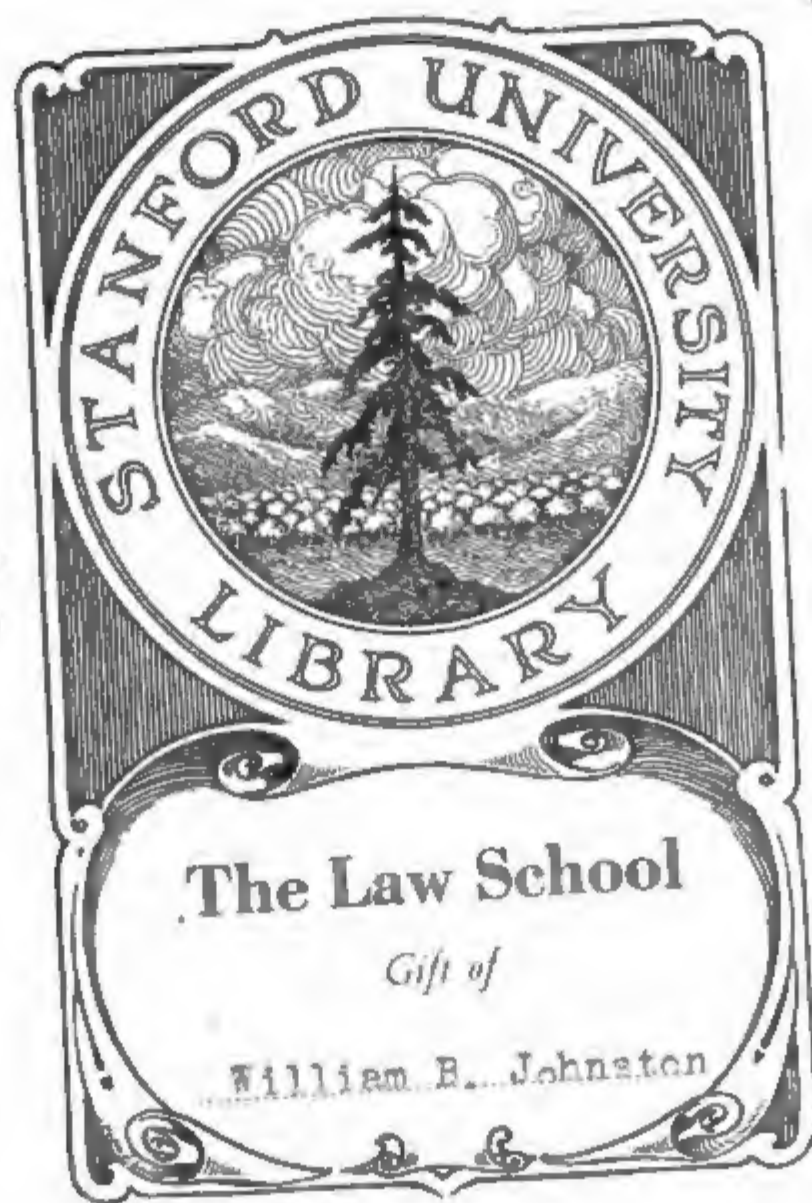
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ESTEE'S
PLEADINGS, PRACTICE
AND FORMS,

IN ACTIONS BOTH LEGAL AND EQUITABLE UNDER

CODES OF CIVIL PROCEDURE.

FORMS IN ACTIONS; IN SPECIAL PROCEEDINGS; IN PROVISIONAL REMEDIES; AND OF AFFIDAVITS, NOTICES, ETC., ETC.

BY MORRIS M. ESTEE,
COUNSELOR AT LAW.

SECOND EDITION.

REVISED AND ADAPTED TO THE LATEST STATUTES AND DECISIONS,

BY JOHN HAYNES,
COUNSELOR AT LAW.

IN THREE VOLUMES.

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For Damages Upon Wrongs.

PART SECOND—FOR INJURIES TO PROPERTY.

CHAPTER I.

BAILEES.

No. 378.

i. Against a Bailee—Common Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant received from the plaintiff certain goods, and the defendant thereupon gave to the plaintiff a receipt for the same, of which the following is a copy [copy receipt].

II. That on the day of, 187., the plaintiff demanded of the defendant that he deliver said goods, but he refused to do so, to the plaintiff's damage dollars.

[Demand of Judgment.]

NOTE.—For the provisions of the Civil Code of California on the contract of deposit, see secs. 1813 to 1878, inclusive.

1. **Bailee** is not used in the limited sense "to keep, to transfer, or to deliver," as in section 71 of the act of 1850, concerning crimes and punishments: *People v. Poggi*, 19 Cal. 600; overruling *People v. Cohen*, 8 Cal. 42.

2. **Bailees, Who are.**—When a redemptioner pays an excess of money to the sheriff, the sheriff is bailee of the redemptioner as to the excess, who may recover it back on demand, it not having been paid over to the redemptionee: *McMillan v. Vischer*, 14 Cal. 232.

3. **Bailor, Liabilities of.**—A man may steal his own property, if by taking it his intent be to charge the bailee with the property, and thus impose a loss on him: *People v. Stone*, 16 Cal. 369.

4. **Delivery to Wrong Person.**—Where property is not put in a bailee's charge by the owner, but comes into his possession through the owner's neglect, and where he may not know to whom it belongs or by whom it was left, he should not be responsible for delivering it to the wrong person, if he has exercised all the care that could be reasonably expected of him under the circumstances: *Morris v. Third Av. R. R. Co.*, 1 Daly, 202.

5. Demand.—When a bailee disclaims his relation to the bailor he cannot claim the right to require a demand for the money before interest is charged against him: *Dickinson v. Owen*, 11 Cal. 71.

6. Goods Deposited.—A depository with whom goods have been stored by one confessedly acting as an agent, must deliver them to the principal on his demand, notwithstanding the agent forbids him to do so: *Ball v. Liney*, 44 Barb. 505.

7. Law of Louisiana.—Under the law of Louisiana, there are two kinds of pledges, the pawn and the antichresis. A thing is said to be pawned when a movable is given as a security; the antichresis consists of immovable objects: *Livingston v. Story*, 11 Pet. 351.

8. Lien on Goods.—A common carrier or innkeeper has a lien on the property for his reasonable and just charges therefor, but one who merely provides food as an agister, or a livery stable keeper, has no lien on the property unless there is a special agreement to that effect: *Lewis v. Tyler*, 23 Cal. 364. But by sec. 3051, Cal. Civ. Code, as amended in 1878, stable keepers and those who pasture stock have a lien.

9. Note as Security.—When a promissory note is assigned as collateral security for a debt, and no special contract is made, the contract rights, duties and liabilities are the same as in the case of the assignment of a note for value, except in one respect, which is that the assignee undertakes to pay to the assignor the overplus that he may receive on the collateral after the satisfaction of the principal debt. Dissenting opinion of Rhodes, J., in *Donohoe v. Gamble*, 38 Cal. 354.

10. Notice of Sale of Pledge.—The notice of the sale of the pledge should apprise the pledgor of the time and place of sale; as the object is not that the notice should operate as a demand, but that the pledgor should be enabled to bid at the sale, or procure a good bid to be made, etc: See *Brown v. Ward*, 3 Duer, 660; *Castello v. City Bank*, 1 N. Y. Leg. Obs. 25; *Willoughby v. Comstock*, 3 Hill, 389; *Tucker v. Wilson*, 1 Bro. P. C. 494; S. C., 1 P. Wms. 261; *Lewis v. Graham*, 4 Abb. Pr. 106; see Cal. Civ. Code, sec. 3001 *et seq.*

11. Personal Property.—Personal property may be pledged, mortgaged, hypothecated, or placed in trust, upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case: *Hyatt v. Argenti*, 3 Cal. 151. For the provisions of the Cal. Civ. Code on the contract of pledge, see secs. 2986 to 3011, inclusive.

12. Pledge.—Property pledged to the keeper of a brothel to secure payment for wine, etc., consumed in a debauch, in said brothel, cannot be recovered of the pledgee by the pledgor: *Taylor v. Chester*, L. R. 4 Q. B. 309.

13. Pledgee's Responsibility.—A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody or care of the goods pledged, and he is held responsible for ordinary negligence: *St. Losky v. Davidson*, 6 Cal. 643.

14. Power to Sell Pledge.—A party depositing securities for securing the payment of a debt, or advances made thereon, may agree that they shall be sold at the option or pleasure of the creditor: *Hyatt v. Argenti*, 3 Cal. 151.

A sale made under such authority is good without notice to the plaintiff of the time and place of such sale or previous demand of payment; but if no such agreement be made, the sale can be made only on notice to the pledgor: 7 J. J. Marsh. 322; *Stearns v. Marsh*, 4 Den. 227; 2 Kent's Comm. 749; *De Lisle v. Priestman*, 1 Brown (Pa.) 176; *Hart v. Ten Eyck*, 2 Johns. Ch. 62. And if not otherwise agreed, the sale must be at public auction: *Castello v. City Bank*, 1 N. Y. Leg. Obs. 25; *Jones v. Thurmond*, 5 Tex. 318; *Rankin v. McCullough*, 12 Barb. 103. In California, the pledgee is not authorized to sell the pledge without calling on the pledgor to redeem, and giving him reasonable notice of his intention to sell: *Gay v. Moss*, 34 Cal. 125. And where, without calling on the pledgor to redeem, the pledgee sold the pledge (a chose in action), it was a conversion of the pledge, and plaintiff might recover its value at the time of its conversion, in excess of the demand secured by the pledge: *Id.*; see Cal. Civ. Code, sec. 3001 *et seq.*

15. Redemption of Mining Stock Pledged.—The pledgee of mining stocks upon the redemption of the pledge is not obliged to return the identical certificates pledged, but may return similar certificates. Nor does the fact that the pledgee has sold the particular certificates pledged, render him liable for a conversion provided he restores similar certificates to the pledgor on redemption, and has at all times been ready to do so: *Thompson v. Toland*, 48 Cal. 99.

16. Title to Pledged Property.—A pledge does not vest the title in the pledgee. He has only a special property in or lien on the chattel pledged, and if the pledge is not redeemed by the time limited it retains the character of a pledge still: *Heyland v. Badger*, 35 Cal. 404.

17. Use of Money.—An attaching creditor of the bailee, levying on the money in the hands of a stockholder with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished: *Hardy v. Hunt*, 11 Cal. 343.

No. 379.

ii. *For Injury to Pledge.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff delivered to the defendant [describe articles], the property of this plaintiff, of the value of dollars, as a pledge to the defendant to secure the sum of dollars, theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by plaintiff.

II. That the defendant so negligently conducted in respect to said articles, and so carelessly used the same that they became, by reason of his negligence and carelessness,

greatly damaged [state injury], and were rendered of small value to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

No. 380.

iii. *For Loss of Pledge.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff delivered to the defendant [describe articles], the property of this plaintiff, of the value of dollars, by way of pledge to the defendant, to secure the sum of dollars theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by the plaintiff.

II. That the defendant has failed to fulfill said agreement on his part; and, on the contrary, so negligently and carelessly kept said articles, that while they were in his possession for the purposes aforesaid, they were through his negligence lost, to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

No. 381.

iv. *For not Taking Care of and Returning Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff delivered to the defendant [describe the articles], of the value of dollars, to be by the defendant safely and securely kept for the plaintiff [for a compensation], and to be returned and re-delivered to the plaintiff on request, which the defendant then and there promised and undertook to do.

II. That the plaintiff performed all the conditions thereof on his part, and on the day of, 187., requested the defendant to re-deliver said goods.

III. That the defendant did not take due care of and safely keep the said goods for the plaintiff, nor did he, when so requested, or afterwards, or at all, re-deliver the

same to the plaintiff; but, on the contrary, the defendant so negligently and carelessly conducted himself with respect to the said goods, and took so little care thereof, that by and through the carelessness, negligence, and improper conduct of the defendant and his servants, the goods were wholly lost to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

No. 382.

i. Against Hirer of Chattels, for not Taking Proper Care of Them.

[TITLE]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant hired and received of the plaintiff certain furniture [briefly designate the same], of the value of dollars, for the period of then next ensuing, at the sum of dollars per month.

II. That the defendant did not take proper care of the said furniture, or use the same in a reasonable or proper manner during the said time, but took so little care thereof that they became injured and deteriorated in value, to plaintiff's damage dollars.

[*Demand of Judgment.*]

No. 383.

ii. For Injury to Horse, Resulting from Immoderate Driving.

[TITLE]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant hired and received from the plaintiff a horse to drive, which was of the value of dollars.

II. That the defendant drove the horse so hard, and so neglected the care of him, that the said horse afterwards, and because of said immoderate driving and want of proper and reasonable care, on the day of, 187., died [or otherwise state the injury], to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

NOTE.—The owner of a horse, which he has let to go a specified journey within a given time, cannot recover for the loss of the horse if it dies from the effects, where it has only been driven in the manner agreed upon: *Ruggles v. Fay*, 31 Mich. 141.

No. 384.

iii. *For Driving Horse on a Different Journey from that Agreed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant hired and received from the plaintiff a horse and carriage, of the value of dollars, the property of the plaintiff, to drive from to, and not elsewhere.

II. That the defendant, in violation of the agreement, performed a different journey than that aforesaid, and drove said horse and carriage from to

III. That he did not take proper care of said horse and carriage, but so negligently drove and managed the same that the carriage was broken, to the damage of plaintiff in dollars.

[Demand of Judgment.]

No. 385.

i. *Against Innkeeper, for Loss of Baggage.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the city of, known as "the Hotel."

II. That on the day of, 187., this plaintiff was received by the defendant into his said inn as a traveler, together with his baggage, consisting of, of the value of dollars [here describe articles], the property of the plaintiff.

III. That the defendant and his servants so negligently and carelessly conducted themselves and misbehaved in regard to the same, that while he so remained at said inn, his said trunk was taken away from the room of the plaintiff, by some person or persons to the plaintiff unknown; and thereby the same was wholly lost to the plaintiff, to his damage dollars.

[Demand of Judgment.]

18. At Common Law.—To hold a party liable at common law for the loss of goods at his inn, it must appear not only that he kept an inn and that the goods were lost there, but that he was acting in the capacity of innkeeper

when the goods were received, and that the owner was his guest: *Carter v. Hobbs*, 12 Mich. 52.

19. Boarding-house Keeper.—A boarding and lodging-house keeper is liable for the loss of his guest's goods occasioned through the negligence of his own servants acting within the scope of their employment: *Smith v. Read*, 52 How. Pr. 14.

20. Delivery not Necessary.—A delivery of the goods to the innkeeper is not necessary to charge him with them. The innkeeper is bound to pay for them in any event, if stolen or carried away, even though the person who took them away is unknown: *Burrows v. Trieber*, 21 Md. 320.

21. Exception.—An innkeeper is liable for all loss or damage to the goods of his guests occurring while they are in his possession, except when such loss or damage is occasioned by the act of God or the public enemy, or through the fault of the owner: *Hulett v. Swift*, 42 Barb. 230.

22. Goods.—Innkeepers are liable for the goods of a guest which are brought by him within the inn: *Burrows v. Trieber*, 21 Md. 320; whether at the time of his arrival or subsequently: *Pinkerton v. Woodward*, 33 Cal. 557.

23. Delivery.—As to the extent of his liability for articles of jewelry in usual wear, and for money, see *Gile v. Libby*, 36 Barb. 70; *Wilkins v. Earle*, 19 Abb. Pr. 190; See, also, *Pinkerton v. Woodward*, 33 Cal. 557.

24. Liable as Insurer.—Innkeepers are liable as insurers of their guests' property: *Hulett v. Swift*, 33 N. Y. 571; affirming S. C., 42 Barb. 230; *Pinkerton v. Woodward*, 33 Cal. 557.. But not when guest, after being duly warned, neglects any necessary precaution: *Wilson v. Halpin*, 1 Daly, 496; 30 How. Pr. 124.

25. Neglect to Disclose Value of Package.—As to effect of omission of guest to disclose value of package committed or offered to be committed to innkeeper's charge: See *Wilkins v. Earle*, 19 Abb. Pr. 190; *Bendetson v. French*, 44 Barb. 31.

26. Not a Guest.—Innkeeper is only liable as bailee for horse of person not his guest but lodging elsewhere: *Ingallsbee v. Wood*, 33 N. Y. 577; affirming S. C. 36 Barb. 452.

No. 386.

ii. For Loss of Pocket Book.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, at the time hereinafter stated, was a common innkeeper at

II. That on the day of, 187., he received and entertained this plaintiff as a guest at his inn for hire.

III. That while the plaintiff was then and there his guest, the defendant undertook, for compensation paid him by the plaintiff, to keep safely in one of his sleeping-rooms of his said hotel or inn, the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person,

and that the plaintiff thereupon put into his said sleeping-room in said hotel or inn his clothing, his pocket-book containing money, and such other property as is usually carried upon the person, of the value of dollars, and left the same in the possession and charge of the defendant, both as inn-keeper and as special bailee as aforesaid.

IV. That while this plaintiff was sleeping, his pocket-book and money were, by the negligence, carelessness, and dishonesty and improper management of the defendant and his servants, lost and stolen.

V. That the amount of the said money belonging to the plaintiff so lost and stolen, while the same was under the charge of the defendant, was dollars in gold coin of the United States, and that the plaintiff is by profession [state business], and that said sum was such as he might reasonably and properly carry with him with reference to his circumstances and business.

[Demand of Judgment.]

No. 387.

i. *Against Warehouseman, for Injury to Goods by Neglect to Obey Instructions.*
[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant in consideration of the sum of dollars, then and there paid to him by plaintiff, agreed to store and keep safely in his warehouse at, the following goods, the property of the plaintiff, of the value of dollars, consisting of [here designate goods], for the term of weeks from said date, and then safely to deliver said goods to plaintiff at his request, and then and there received said goods for such purpose.

II. That at the time of the delivery of said goods to defendant, the plaintiff informed him that it was necessary to the preservation of said goods that they should be handled with care.

III. That the defendant negligently allowed the same to be handled without care, and roughly moved and broken, so that the same, through the negligence of the defendant and his servants, became entirely ruined, to the damage of the plaintiff dollars.

[Demand of Judgment.]

27. Burden of Proof.—When goods arrive at the point of destination, and are placed in the warehouse of the company, its liability as warehousemen commences, and from that time it is bound to use only ordinary care and diligence in safely keeping and delivering the goods: *Jackson v. Sac. V. R. R. Co.*, 23 Cal. 268; see, also, *Collins v. Burns*, 63 N. Y. 1. The failure of a bonded warehouseman to deliver upon demand of the owners, goods deposited with him, upon which the duties have been paid, casts upon him the burden of accounting for them: *Schwerin v. McKie*, 51 N. Y. 180.

28. Common Carrier or Warehouseman.—In an action against a railroad company for loss of goods as common carriers, where the proofs render it uncertain whether the goods are lost while being transported, or after being deposited in the warehouse, and there is no proof of want of ordinary care, a judgment for the plaintiff will be reversed: *Jackson v. Sac. V. R. R. Co.*, 23 Cal. 268.

29. Grain.—A warehouseman who received grain of another for the purpose of storage, is only bound to ordinary care in its preservation: *Myers v. Walker*, 31 Ill. 353.

30. Insurance.—Where a warehouseman agrees to insure goods deposited with him, and does so, and subsequently the goods are destroyed by fire, and he agrees with the owner to prosecute suits against the insurance company in his own name, and does so, but the suit is defeated owing to the terms of a receipt given to the owner at his request, by the warehouseman: *Held*, that the warehouseman is not liable: *Cole v. Favorite*, 69 Ill. 457.

31. Parties.—Warehousemen occupying a private “bonded warehouse,” who hold goods of a merchant subject to the lien of government for unpaid duties, under the acts of Congress of 1854 and 1862, are liable to the owner in an action for a loss of them, without joining as a defendant the revenue officer in whose custody the statute declares such goods to be. The custody intended by the statute is a guard or watch, and not legal possession for all purposes: 22 N. Y. 370; 24 Id. 536; 2 Blatchf. 121; *Schwerin v. McKie*, 5 Rob. 404.

32. Removal of Goods.—When the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense: *Held*, that their removal by an agent of the bailees, though without their knowledge, charged them for the safe keeping of their goods after their removal, and that they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage: *St. Losky v. Davidson*, 6 Cal. 643.

33. Waiver of Lien.—When a warehouseman who has goods in charge, states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of the warehouseman’s lien for charges, if any he had: *Blackman v. Pierce*, 23 Cal. 508.

34. Want of Care.—To charge a railroad corporation as warehousemen, the plaintiff must show a want of ordinary care on their part in the custody of the goods: *Jackson v. Sac. V. R. R.*, 23 Cal. 268.

35. Wharfingers.—Where grain was delivered to wharfingers with instructions to ship to a certain party when certain rates could be had, but before shipment they were instructed not to ship to such party but to another, and they neglected the second instruction but acted on the first, whereby the

price of the grain was lost to the owner on account of the insolvency of the consignee: *Held*, that the wharfingers were liable: *Howell v. Morlan*, 78 Ill. 162.

No. 388.

ii. *For Refusal to Deliver Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, in consideration of the payment to him of dollars [or cents per ton per month], agreed to keep in his warehouse [..... tons of wheat], and to deliver the same to plaintiff on payment of the said sum.

II. That thereupon the plaintiff deposited with the defendant the said [..... tons of wheat].

III. That on the day of, 187., the plaintiff requested the defendant to deliver the said goods, and tendered him dollars [or the full amount of storage due thereon], but the defendant refused to deliver the same, to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

36. Pasturing Stock.—Where defendant, an agister of cattle, placed plaintiff's horse in a field, knowing that a bull kept on adjoining land had several times been found in the field in which the horse was placed, and that there was no sufficient fence to keep it out, and there were several heifers in the field with the horse, and the horse was gored and killed by the bull. In an action for breach of contract in not taking reasonable care of the horse: *Held*, that a knowledge of the mischievous nature of the bull was not essential to the liability of defendant, and a verdict against him would not be disturbed for want of such knowledge: *Smith v. Cook*, 1 L. R. Q. B. Div. 79.

37. Property of Plaintiff.—Though it is usual to aver that the goods were the property of the plaintiff, we do not deem such an averment necessary. He could sue in his own name if he were but the agent of the owner: N. Y. Code Commissioners.

CHAPTER II.

COMMON CARRIERS.

No. 389.

i. *Against Common Carrier, for Breach of Duty.*
[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire, between the places hereinafter named.

II. That on the day of, 187 , at, one A. B. delivered to the defendant certain goods, the property of the plaintiff, to wit [designate the goods], of the value of dollars, and the defendant, as such carrier, received the same, to be by him safely carried to, and there delivered to, for a reasonable reward to be paid by therefor.

III. That the defendant did not safely carry and deliver said goods; but, on the contrary, so negligently conducted, and so misbehaved in regard to the same, as such carrier, that the same were wholly destroyed and lost to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

NOTE.—For the provisions of the Civil Code in relation to carriage in general, carriage of persons, carriage of property, carriage of messages, and common carriers, see Title VII, secs. 2085 to 2209.

1. Act of God.—The breach of a contract to navigate on a river is excused if caused by the river's freezing, so as to make navigation impossible, this being an act of God. That the contractor, at the time of making the contract, had reasons which were equally obvious to the other party, for expecting such an event, does not alter the case: *Worth v. Edmonds*, 52 Barb. 40; see note 27.

2. Bound to Safely Transport.—As common carriers, they are bound to safely transport and deliver goods to the point of their destination, unless the same are lost by the act of God or the public enemy. In such a case, the burden of proving that they are thus lost rests upon the company: *Jackson v. Sac. V. R. R. Co.*, 23 Cal. 268; *Bohannon v. Hammond*, 42 Cal. 227. As to the obligations of carriers of property, see Civil Code, sec. 2114, and following.

3. Compelled to Act as Common Carriers.—Under the general railroad law, all railroads are compelled to act as common carriers for the con-

veyance of all passengers and property which may come to their road for that purpose: *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323.

4. Concurrent Negligence.—As to effect of concurrent want of due care on part of owner, see *Hamilton v. McPherson*, 28 N. Y. 72.

5. Connected Routes.—Each company concurring in the carriage of goods on a connected route, is liable, even though part of joint route be out of State: *Burtis v. Buffalo & State Line R. R. Co.*, 24 N. Y. 269; *Simmons v. Law*, 8 Bosw. 213; *McDonald v. Western T. Railroad Corporation*, 34 N. Y. 497. The above rule is partially relaxed to the effect that each company is only liable for carriage of the goods in the condition in which it receives them: *Smith v. N. Y. Central R. R. Co.*, 43 Barb. 225. A railroad company which for a consideration receives the cars of a connecting company into its custody and control, and draws them with their contents over its own road, is liable as a common carrier for injuries to such cars during their transit over such road: *Vermont & M. R. R. Co. v. Fitchburg R. R. Co.*, 14 All. 462. As to how far liability may be qualified, see *C. H. & D. R. Co. v. Pontius & Richmond*, 19 Ohio St. 221. When a railroad company contracts to forward goods from Cincinnati to Philadelphia, it is an entire contract, and the company is liable for any damage on the whole route: *Fatman & Co. v. C. H. & D. R. Co.*, 2 Disney, 248; *Gaines v. Union Trans., etc. Co.*, 28 Ohio St. 418; *Field v. Chicago, etc., R. R.*, 71 Ill. 458. In case of a passenger ticket over several lines, for an entire price, the contract is entire, and the company selling the ticket may be held solely liable, or the traveler may look to the real principals, and subject all who are interested in the joint contract: *Check v. L. M. R. Co.*, 2 Disney (Cin. Supr. Ct.) 237.

6. Degree of Care.—A railroad company must provide all reasonable precaution to protect property of others, and it must also be properly used, and the company are liable for carelessness. They are bound to exercise a degree of care proportionate to the danger: *Gerke v. Cal. Steam Navigation Co.*, 9 Cal. 251; see *L. M. R. Co. v. Washburne*, 22 Ohio St. 332.

7. Delivery.—Delivery to carrier in good order must be shown to maintain an action for full value. Burden of proof then shifts: *Smith v. N. Y. Central R. R. Co.*, 43 Barb. 225. And must be to him or his authorized agent: *Ball v. New Jersey Steamboat Co.*, 1 Daly, 491.

8. Duties as Carriers of Persons.—"A carrier of persons without reward must use ordinary care and diligence for their safe carriage:" Civil Code, sec. 2096. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage; must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill:" Civil Code, sec. 2100; see, also, *Id.* secs. 2101 to 2104.

9. Duties as Carriers of Property.—As to the care and diligence required, directions, conflict of orders, stowage, deviation, etc., delivery of freight, obligations when freight not delivered, and how exonerated from liability, see Civil Code, secs. 2114 to 2121 and 3155.

10. Duties as Bailees.—Where carriers make it the duty of their agents by general regulation to take charge of property inadvertently left in their cars, and provide at their depot a place for its safe keeping, they must in taking charge of the property be looked upon as in the light of bailees for hire, who are bound to exercise ordinary care and diligence: Ang. on Carr. secs.

75, 112, 131, 302; *Edw. on Bailments*, 35, 36; 26 Wend. 591; 7 Hill, 47; *Morris v. Third Avenue R. R. Co.*, 1 Daly 202; see *The case of O'Bannon v. Southern Ex. Co.*, 51 Ala. 481.

11. Essential Averments.—The complaint contained averments against the defendants as common carriers, and the action was for damage done to merchandise in their transportation: *Held*, that it was indispensable for the plaintiff to prove that defendants were common carriers, and that the goods were delivered to, and received by them as such, for the purpose of being transported for hire: *Ringgold v. Haven*, 1 Cal. 116.

12. Injury Remotely Attributable.—A common carrier is absolutely liable for injury remotely attributable to his own default, though inevitable accident be the immediate cause: *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564; *Reed v. Spaulding*, Id. 630; *Merritt v. Earle*, 29 Id. 115.

13. Insured.—It would seem that in our State, the common carrier is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising—the acts of God and the public enemy alone excepted: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 10; see 100 Mass. 506; 93 U. S. 186; and *Bohannon v. Hammond*, 42 Cal. 227.

14. Letters.—A common carrier of letters inclosed in envelopes is not liable for any loss beyond that of an ordinary letter, unless informed of the value of the same at the time he received the same. *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185; see Civil Code, secs. 2161, 2162 and 2167.

15. Liability of Inland Carriers for Loss.—Unless the consignor accompanies the freight and retains the exclusive control of it, the carrier is liable from the time he accepts it until he is relieved from liability pursuant to secs. 2118 to 2122 for loss or injury from any cause whatever, except: 1. An inherent defect, vice, or weakness, or a spontaneous action of the property itself; 2. The act of a public enemy of the United States, or of this State; 3. The act of the law; or, 4. Any irresistible superhuman cause; and the carrier is liable, even in cases coming within the above exceptions, if his ordinary negligence exposes the property to the cause of the loss: See Civil Code, secs. 2194, 2195. A carrier is liable for delay only when it is caused by his want of ordinary care and diligence: Id. sec. 2696.

16. Liability, how Terminated.—The liability of a carrier ceases, and he becomes an ordinary bailee, on refusal of consignee to receive the goods: *Hathorn v. Ely*, 28 N. Y. 78; *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610. Or by delivering to agent expressly or impliedly authorized to receive goods: *Platt v. Wells*, 26 How. Pr. 442; *Hotchkiss v. Artisans' Bank*, 42 Barb. 517. Such delivery to agent must be regularly made, and in due course of business: *Cronkite v. Wells*, 32 N. Y. 247. But though liable as insurer until actual delivery, he may be discharged by neglect of owner of goods to take them in due season: *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548; *Gilhooly v. N. Y. & Savannah Steam Navigation Co.*, 1 Daly, 197; see, also, Civil Code, sec. 3155.

17. Live Stock.—The defendants, as carriers, transporting live stock, met with an accident for which they were not liable under their contract, by which the animals were killed: *Held*, that they were not liable for not delivering the carcasses, where they had offered to carry the carcasses through, if

the owner, who was present, would take charge of them, and the offer was declined: *Lee v. Marsh*, 43 Barb. 102; 28 How. Pr. 275.

18. Notice to Owner.—Notice to restrict the liability of carriers, is not sufficient to bind the owner of goods carried, if only given without his knowledge or assent, to one who was directed by him to deliver the same to the carrier: *Fillebrown v. Grand Trunk R. R. Co.*, 55 Me. 462; *C. H. & D. R. v. Pontius & Richmond*, 19 Ohio St. 221; see, also, Civil Code, secs. 2174, 2175 and 2176.

19. Obey Instructions.—As to the absolute duty to obey the instructions of the owner of goods directed to be forwarded beyond the terminus of his own route, and his responsibility in case of a deviation, see *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610; and Civil Code, secs. 2115, 2116.

20. Perishable Property.—When two kinds of property, one perishable and the other not, are delivered to a common carrier at the same time, by different owners for transportation, if the carrier cannot carry all the property, he may give preference to the perishable; and if either must wait, it should be the latter: *Marshall v. N. Y. etc. R. R. Co.*, 45 Barb. 502.

21. Presumption.—The presumption is that the responsibility of a party as carrier continues until the entire transit is completed: *Ladue v. Griffith*, 25 N. Y. 364. And further until actual delivery to the party to whom the goods are addressed, or his agent: *Fenner v. Buffalo & State Line R. R. Co.*, 46 Barb. 103. Or to the carriers next in order on a connected route: *McDonald v. Western T. R. R. Corporation*, 34 N. Y. 497. In the absence of an express contract, the obligation of a carrier of goods is to carry them according to the usual route for the conveyance of such articles by him for the public, and to deliver them within a reasonable time: *Hales v. London, etc. R. R. Co.*, 4 B. & S. 66. The presumption of law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means: *Agnew v. Steamer Contra Costa*, 27 Cal. 425.

22. Principal and Agent.—A contractor for carrying the mail is liable for the negligence of the carrier: *Sawyer v. Corse*, 17 Grat. 230.

23. Responsibility of Railroad Companies.—For full and definite statement as to positions which may be considered as settled with reference to responsibility of railroad companies as common carriers, see *Bissell v. N. Y. Central R. R. Co.*, 25 N. Y. 442, 455-6.

24. Treatment of Passengers.—If a railroad company holds itself out as a common carrier to a point beyond the termination of its road, it is deemed a common carrier for the whole distance, and if it professes to contract, and does contract with, and carries persons the entire distance, it must treat all alike, and contract with and carry all who apply. This principle applies to the carriage of goods as well as passengers: *Wheeler v. S. F. & A. R. R. Co.*, 31 Cal. 46.

25. When not Liable.—A carrier is not liable for the loss of money of one passenger contained in a valise which another passenger, with the knowledge of the first, delivers as his own baggage, and the carrier receives it as such: *Dunlap v. International Steamboat Co.*, 98 Mass. 371. Carriers cannot be held liable for the breaking of very brittle articles in a package for want of specially careful handling, if they are not warned of the contents of the package: *American Express Co. v. Perkins*, 42 Ill. 458.

26. Without Compensation.—A common carrier is not liable for the loss of goods where he is to receive no compensation for the carriage, and where he has exercised ordinary diligence in respect to the same. His liability in such a case is only that of a bailee without hire: *Fay v. Steamer New World*, 1 Cal. 348. The rule seems to be different in Minnesota. A complaint which alleges a delivery of goods to a common carrier, and acceptance by him to be conveyed by him without reward, the loss of the goods occasioned by the gross negligence of the defendants, together with the value of the goods and the amount of the loss of the bailor, states a ground of action: *McCauley v. Davidson*, 10 Minn. 418. All bailments, with or without compensation to the bailee, are contracts founded on a sufficient consideration: *Id.*

No. 390.

ii. *Against Common Carrier, for Loss of Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was a common carrier of goods, for hire, between the places hereinafter mentioned.

II. That on the day of, 187., at in consideration of the sum of, then paid [or as the case may be] to him by the plaintiff, the defendant agreed safely to carry to, and there deliver to, or order [or otherwise, according to the fact], certain goods, the property of the plaintiff, of the value of dollars, consisting of [here describe the goods], which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned.

III. That the defendant did not safely carry and deliver the said goods pursuant to said agreement, but on the contrary, the defendant so negligently conducted and so misbehaved in regard to the same, in his calling as carrier, that they were wholly lost to the plaintiff, to his damage..... dollars.

[Demand of Judgment.]

27. Act of God.—The expression, “act of God,” as used in the law of carriers, includes those losses and injuries which are occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight: 21 Wend. 190; 31 Barb. 38; 3 Esp. 127; 1 T. R. 27; 1 Harp. 468; 4 Harr. 448; 4 Bing. 607; 4 Zab. 697; Edw. on Bail. 454; Ang. on Carr. sec. 156; *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564. Those acts are to be regarded in a legal sense as the acts of God which do not happen through human agency, such as storms, lightnings and tempests: *Polack v. Pioche*, 35

Cal. 416. The elements are the means through which God acts, and damages by the elements are damages by the act of God: See note 1.

28. Date—Amount.—A complaint which does not state the date of the draft, which was lost by a common carrier, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient: *Zeigler v. Wells, Fargo & Co.*, 23 Cal. 179.

29. Liability.—The law adjudges a common carrier responsible for loss of goods, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies: *Merritt v. Earle*, 29 N. Y. 115; Civil Code, secs. 2194, 2195.

30. Rule of Damages.—In an action against carriers, the rule of damages is the value of the goods at the port of delivery, and not the invoice price, or the value at the port of shipment: *Ringgold v. Haven*, 1 Cal. 108. A common carrier for hire is liable for punitive damages for a gross, willful and tortious breach of the duty enjoined upon him by law: *Mendelsohn v. The Anaheim Lighter Co.*, 40 Cal. 657. A principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, but is not responsible for wanton and malicious damage done by the agent without the consent, approval or subsequent ratification of the principal: *Id.*

No. 391.

iii. *For Loss of Baggage.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant was a common carrier of passengers and their baggage, by [stage coach], from to, for hire.

II. That on that day he received into his [coach] the plaintiff with his baggage, to wit [designate baggage], of the value of dollars, to be carried from said to, for dollars then paid to the defendant [or for him].

III. That the defendant did not use proper care therein, but, by the negligence and improper conduct of him and his servants, said baggage was wholly lost, to the damage of the plaintiff dollars.

[Demand of Judgment.]

31. Acceptance of Goods.—To charge a carrier, there must be an acceptance of the goods, either in a special manner, as by "checking," or according to the usage of their business: Story on Bailm. sec. 533; Ang. on Carr. sec. 140; 1 Ld. Raym. 46; 5 Esp. 41; 7 Hill, 47; 2 Mau. & S. 172; *Ball v. N. J. Steamboat Co.*, 1 Daly, 491.

32. Baggage.—The baggage of a passenger entrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods are which are entrusted to a common carrier of goods: *Merrill v. Grinnell*, 30 N. Y. 594. As to the duty of carriers by water with respect to baggage of passengers: *Merrill v. Grinnell*, 30 N. Y. 594; *Chamberlain v. West. Transp. Co.*, 45 Barb. 218; *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151; *Glasco v. N. Y. Cent. R. R. Co.*, 36 Barb. 557; *Gilhooly v. N. Y. & Savannah S. N. Co.*, 1 Daly, 197; see Civil Code, secs. 2180 to 2183.

33. Baggage, what is.—The jury are to determine what constitutes baggage under the circumstances. A sum of money reasonably necessary to defray the expenses of the journey is properly baggage; this depends upon the length of the journey, and to some extent the wealth of the traveler, and it includes such an allowance for accident or sickness, and for sojourning by the way, as a reasonable, prudent man would consider it necessary to make. It should be limited to money for traveling expenses, properly so called: *Merrill v. Grinnell*, 30 N. Y. 594. And the carrier is responsible for the loss of money in a passenger's trunk to the extent of reasonable traveling expenses: *Id.* But not for jewelry belonging to a third person: *Richards v. Wescott*, 7 Bosw. 6. Civil Code, sec. 2181, declares that luggage may consist of any articles intended for the use of a passenger while traveling, or for his personal equipment.

34. Baggage, Retaining Custody of.—The carrier of passengers by steamboat is not exonerated from responsibility for the personal baggage of a passenger, by the fact that the passenger deposits it in the stateroom occupied by him, of which he has the key, and from which it is stolen: 19 Wend. 236; 4 Man. & S. 310; 7 Hill, 47; *Mudgett v. Bay State Steamboat Co.*, 1 Daly, 151. So, a mere supervision of one's baggage, will not relieve from responsibility: 2 Bos. & P. 416.

35. Money Stolen.—The owners of a steamboat are not liable for money stolen from the pockets of a passenger, it not being proved it was stolen by persons employed on board: *Abbott v. Bradstreet*, 55 Me. 530.

36. Route.—It is not deemed necessary to state the whole route of the defendants. That they were carriers between and, is sufficient: See *Clark v. Faxton*, 21 Wend. 153.

37. Vehicle.—A common carrier is absolutely bound, irrespective of negligence, to provide roadworthy vehicles: *Alden v. N. Y. Central R. R. Co.*, 26 N. Y. 102; Civil Code, secs. 2184, 2185.

No. 392.

iv. *Against Carrier by Water, for Negligence in Loading Cargo.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff, at the request of the defendant, caused to be delivered to him [designate the goods] of the plaintiff, of the value of dollars, to be by the defendant safely and securely loaded on board a certain vessel, at,

for the plaintiff, for a reasonable compensation to be paid said defendant therefor; and the defendant then received the goods for that purpose.

II. That the defendant afterwards, by himself and his servants, conducted so carelessly and improperly the loading of the said goods on board the said vessel, that by their negligence and improper conduct the goods were broken and injured, and a part thereof wholly destroyed, to the damage of plaintiff in dollars.

[*Demand of Judgment.*]

38. Steam Tuga. — The towing a vessel out to sea by a steamer is the transportation of property, so as to bring the case within the law of common carriers: *White v. Tug Mary Ann*, 6 Cal. 462. And the fact that the owner of the ship lost while being towed out to sea was the agent of the owners of the steam-tug, does not relieve the latter from the obligations under which they contract with others: *Id.* Defendant undertook to tow plaintiff's schooner and a Spanish bark from New Orleans to the Gulf of Mexico. In consequence of the bad steering of the bark by its own men, it broke loose from the tow-boat and damaged the schooner: *Held*, that defendants were liable as carriers: *Clapp v. Stanton*, 20 La. An. 495.

No. 393.

v. *Against Carrier for not Regarding Notice to Keep Dry.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of , 187., at, at the port of, the defendant was master and commander of a certain vessel known as the, then lying at said port, and the plaintiff caused to be shipped on board said vessel certain [describe the goods], the property of the plaintiff, of the value of dollars, which said goods were then in good order and condition; in consideration whereof, and of the sum of dollars, then and there paid by the plaintiff to the defendant, the defendant then and there promised carefully and safely to carry and transport said goods to, and there safely to deliver them to, dangers of the seas only excepted, and then and there received said goods for that purpose.

II. That the plaintiff then and there caused due notice to be given to the defendant that it was necessary to the preservation of said goods that they should be kept dry.

III. That the defendant failed to take care of or safely to

carry said goods; but, on the contrary, not regarding his said promise, so negligently and carelessly carried the same that they became wet, and thereby entirely destroyed [or otherwise state injury, according to the facts]; which injury was not occasioned by reason of any danger of the seas, but wholly through the negligence of the defendant and his servants, by reason whereof the plaintiff was injured, to his damage dollars.

[*Demand of Judgment.*]

39. Damage to Cargo.—In a case of damage to cargo, where the libel alleges the fault of the master to be: 1. That he falsely represented his vessel to be tight, staunch and seaworthy; and, 2. That the danger resulted from the master's carelessness, negligence and improper conduct; the libelant cannot claim another specific ground of complaint not set up in the libel, *e. g.*, that the damage was caused by the fault of the master in not putting into some other port to repair his vessel, and take measures to preserve his cargo: *Soule v. Radocanachi*, 1 Newb. 504.

40. Notice in Writing.—If the carrier have notice, by writing on the article or package, of the need of peculiar care, he is bound to comply with such directions: See *Baxter v. Leland*, 1 Abbott's R. 348; *Hastings v. Pepper*, 11 Pick. 41; and *Sager v. Portsmouth, etc., R. R. Co.*, 31 Maine, 228.

No. 394.

vi. *For Loss in Unloading.*

[TITLE.]

The plaintiff complains, and alleges:

I. [As in form No. 393.]

II. [As in form No. 393.]

III. That said vessel afterwards safely arrived at, and no [excepted perils] prevented the safe carriage or delivery of the goods.

IV. That the defendant did not deliver the said goods to the plaintiff; and for want of due care in the defendant and his servants in unloading and delivering said goods from said vessel, they were broken and injured, and were wholly lost to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

41. Mixing Goods.—Where defendant, without notifying the consignees unloaded coal upon the bare ground, and so carelessly, that different sorts were mixed together with the soil, the defendant's liability did not cease until he had unloaded the coal with due care, and put it in a reasonably safe place: *Rice v. Boston and Worcester R. R. Co.*, 98 Mass. 212; see *Chicago and Alton R. R. Co. v. Scott*, 42 Ill. 132.

No. 395.

vii. *Against Common Carrier, for Failure to Deliver at Time Agreed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation duly organized under and pursuant to the laws of this state, and at the times hereinafter mentioned was a common carrier of goods, for hire, between and

II. That on the day of, 187..., at, the plaintiff delivered to the defendant [describe goods], of the value of dollars, the property of the plaintiff, which the defendant, in consideration of a reasonable compensation to be paid it by the plaintiff, agreed safely to carry to, and there deliver to the plaintiff, on or before the day of

III. That the defendant did not fulfill its agreement safely to carry the same, and to deliver them in on said day; but, on the contrary, although the period between the said [day when received by defendant] and said [day when they should have been delivered] was a reasonable time for carrying the same from to, yet the defendant so negligently and carelessly conducted, and so misbehaved in regard to the same, in its calling as common carriers, that it failed to deliver the same in until the day of 187...

IV. That the market value of said goods in [place of delivery] on the [day agreed] was dollars, but on the [day of actual delivery] was only dollars; and that by reason of the premises the plaintiff was damaged in dollars.

[Demand of Judgment.]

42. Breach of Contract.—A common carrier becomes charged on his contract immediately upon his failure to carry and deliver as agreed: *Jones v. Wells, Fargo & Co.*, 28 Cal. 259.

43. Delivery.—The fact that the consignee's business address was stated in the bill of lading does not oblige the shipper to depart from his known and usual place of delivery, and deliver a cargo at a pier more contiguous to the consignee's place of business: 2 Hilt. 150; 15 Johns. 39; 17 Wend. 305; *Western Trans. Co. v. Hawley*, 1 Daly, 327; see Civil Code, secs. 2118, 2119.

44. Delivery to Wrong Person.—Delivery of goods by a carrier to a wrong person by mistake, or by gross imposition, will not discharge his responsibility to the owner for the value of the goods: *Adams v. Blankenstein*, 2 Cal. 413.

45. Demand.—Where a demand is necessary to perfect plaintiff's title, it must be averred: *Bristol v. Rensselaer & Saratoga R. R. Co.*, 9 Barb. 158.

No. 396.

viii. *Against Carrier on Special Contract for Loss of Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation created by and under the laws of this State, and at the times hereinafter mentioned, being such corporation, was a common carrier of goods for hire between and

II. That on the day of, 187., at, the plaintiff delivered to the defendant, being such corporation, certain goods, the property of the plaintiff, to wit [describe the goods], of the value of dollars, and in consideration of the sum of dollars paid defendant by the plaintiff, the defendant then and there entered into an agreement with the plaintiff in writing, subscribed by the defendant thereunto lawfully authorized by its agent, of which agreement the following is a copy [copy agreement].

III. That the defendant did not safely carry and deliver said goods pursuant to its said agreement; but so negligently and carelessly conducted and misbehaved in regard to the same, that the said goods were wholly lost to the plaintiff, to his damage dollars.

[Demand of Judgment.]

46. Beyond the Limits.—Railroad companies, as common carriers, may make valid contracts to carry passengers or freight beyond the limit of their own road, either by land or water, and in this way become liable for the acts and neglects of other carriers which are in no sense under their control: *Wheeler v. S. F. & A. R. R. Co.*, 31 Cal. 46; see *ante*, note 5.

47. Common Carriers and Forwarders.—The liabilities of common carriers and forwarders, independent of any express stipulations in the contract, are entirely different: *Hooper v. Wells*, 27 Cal. 11. Where the defendants, being both carriers and forwarders, took goods in pursuance of a previous oral agreement to carry, and gave a receipt for the goods, expressing that they were received "to be forwarded:" *Held*, that they were liable as carriers: *Blossom v. Griffin*, 13 N. Y. 569; and see *McCotter v. Hooker*, 8 N. Y. 497.

48. Contract Special.—A carrier may contract against loss from fire not caused by his own negligence: *N. O. Mut. Ins. Co. v. N. O. J. & G. N. R. R. Co.*, 20 La. An. 302. By a contract for carriage of live stock, the owner took the risks of a damage "in unloading, conveyance, and otherwise, whether

arising from negligence or otherwise." The bottom of the car dropped out: *Held*, that if the car was unfit the carrier was liable: *Hawkins v. Great West. R. R. Co.*, 17 Mich. 57.

49. Contract, Construction.—Restrictions on the common law liability of a common carrier, inserted for his benefit in a receipt drawn by himself, and signed by him alone, for goods intrusted to him in such capacity, are construed most strongly against the common carrier: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11. The words, "not to be responsible except as forwarder," in a common carrier's receipt, do not exempt him from liability for loss of goods occasioned by the carelessness or negligence of the employees of a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him in his business of carrier as a means of conveyance: *Id.*

50. Contract—Effect of.—When a special contract is made with a carrier, he becomes as to that transaction an ordinary bailee and a private carrier for hire: 11 N. Y. 490; *Moriarty v. Harnden's Express*, 1 Daly, 227.

51. Intention must be Unequivocal.—The common carrier's liability for loss occasioned by negligence in the agents he employs will not be restricted, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11.

52. Joint Contract.—If the action is upon the contract, a joint contract by all the defendants must be proved. As to when one carrier may be held for a loss occurring on the route of another with whose business he was connected, see 2 Greenl. on Ev. 208, and cases cited; *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 N. Y. 37; *Campbell v. Perkins*, *Id.* 430; *Wright v. Boughton*, 22 Barb. 561.

53. Power of Common Carrier to Qualify his Responsibility.—As to power of common carrier of goods to limit his responsibility by special contract, see *Price v. Hartshorn*, 44 Barb. 655; *Lee v. Marsh*, 43 Barb. 102; 28 How. Pr. 275; *Meyer v. Harden's Express Co.*, 24 How. Pr. 290; *Heineman v. Grand Trunk R. R. Co.*, 31 *Id.* 530; *Moriarty v. Harden's Express Co.*, 1 Daly, 227; see Civil Code, secs. 2174 to 2176, and cases cited in note 5, *ante*.

54. Sunday Contract.—In Massachusetts, a contract made in violation of the Lord's day is void, and no subsequent ratification will sustain an action upon it: *Day v. McAllister*, 15 Gray (Mass.), 433. But the rule laid down in New York does not exempt the carrier from his liability for the loss upon a contract under the Sunday laws of New York, because it is made on Sunday. To render it invalid, it is necessary that the contract should require the work or labor agreed for, to be performed on Sunday. To entitle the plaintiff to recover against the carrier, it is immaterial whether the contract is good or bad. The liability of the carrier is imposed by law, and does not rest on his contract: *Edw. on Bailm.* 466; 2 Wend. 338; 19 *Id.* 239; 1 Chitt. R. 1; *Merritt v. Earle*, 29 N. Y. 115. The making of a contract on Sunday is not labor within the prohibition of Sunday laws, nor was it prohibited by common law: *Horacek v. Keebler*, 5 Neb. 355. And a valid contract may be made on that day for the performance of labor, provided the labor is not to be performed on Sunday: *Johnson v. Brown*, 13 Kan. 529; *Bloom v. Richards*, 2 Ohio St. 387.

CHAPTER III.

AGAINST AGENTS, EMPLOYEES AND OTHERS, FOR NEGLIGENCE.

*No. 397.**i. Against Agent, for not Using Diligence to Sell Goods.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187..., at, the defendant agreed with the plaintiff, as his agent, and for compensation to be paid by plaintiff, to sell for him certain goods, to wit [describe them], of the value of dollars; and thereupon received the same from him for that purpose.

II. That the defendant did not use due diligence to sell the same, but unreasonably delayed so to do; and by reason thereof the same were afterwards sold by the defendant for the plaintiff, and produced dollars less than the same would have produced had the defendant used due diligence in selling the same; and whereby plaintiff incurred dollars expenses in warehousing the same, to his damage in dollars.

[Demand of Judgment.]

1. Ferryman.—It is the duty of the ferryman to see that the teams are safely driven on board the boat, and if he thinks proper he may drive himself, or unharness the team, or unload the wagon, to get them safely on board: *May v. Hanson*, 5 Cal. 360. But if the ferryman permits the party to drive himself, he constitutes him, *quoad hoc*, his agent: *Id.*

2. Negligence of Sheriff.—The mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff in case a writ last in hand was executed first: *Whitney v. Butterfield*, 13 Cal. 335.

3. Pledgee as Agent.—A party, by pledging negotiable securities transferable by delivery, loses all right to the securities when transferred by the pledgee in good faith to a third party. The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises: *Coit v. Humbert*, 5 Cal. 260.

4. Powers of Agent.—In an action by a principal against his agent, charging him with an abuse of his powers, it is necessary to allege that the defendant acted as agent: *Ætna Ins. Co. v. Sabine*, 6 McLean, 393.

5. Unauthorized Act of Agent.—The ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and, being equivalent

to an original authority, an allegation of due authority is sustained by proof of such ratification: *Hoyt v. Thompson*, 19 N. Y. 218. If an agent, acting in good faith, disobey the instructions of his principal, and promptly inform his principal of the fact, the principal should at the earliest opportunity repudiate the act if he disapprove. Silence is a ratification: *Bray v. Gunn*, 53 Ga. 144. A principal is liable for the actual damage caused by the act of his agent, done in the usual course of his employment, but is not responsible for wanton or malicious damage done by the agent without consent, approval or subsequent ratification by the principal: *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657.

No. 398.

ii. *Against Agent, for Carelessly Selling to an Insolvent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant undertook with the plaintiff, as his agent, and for compensation to be paid by him, to sell for him goods of the plaintiff, to wit [designate goods], of the value of dollars, and thereupon received the same from him for that purpose.

II. That the defendant did not use due diligence to sell, or in selling the same, but negligently sold the said for the plaintiff to a person in embarrassed circumstances, then well knowing said person's financial embarrassments, without receiving the price therefor, or taking security for the payment thereof; whereby the plaintiff has hitherto lost, and is likely wholly to lose the price, to plaintiff's damage dollars.

[Demand of Judgment.]

No. 399.

iii. *Against Agent, for Selling for a Worthless Bill.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant undertook with the plaintiff, as his agent, and for a compensation to be paid by him, to sell for him [state what], for cash or an approved bill or note, at thirty days or less, and not otherwise [or state the fact].

II. That the defendant did not use due diligence in selling the same, but negligently and without exercising ordinary business care, sold the same for a bad and insufficient bill of exchange, for dollars, having

months to run, and which is worthless and of no value to the plaintiff; and although the same became payable before this action, it is still unpaid, to the damage of the plaintiff
 dollars.

[*Demand of Judgment.*]

No. 400.

iv. Against an Auctioneer, for Selling Below the Owner's Limit.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant was engaged in the business of an auctioneer, and in consideration that the plaintiff would deliver to him [describe the goods], to be sold by him for the plaintiff for a compensation, undertook, as such auctioneer, at the time and place aforesaid, to sell the same, at and for no less money than the sum of dollars, and not to sell them otherwise.

II. That the plaintiff delivered said goods to the defendant for that purpose.

III. That the defendant, without the knowledge or consent of the plaintiff, sold said goods for less than the sum to which he was so limited as aforesaid, to wit, for. dollars, to his damage dollars.

[*Demand of Judgment.*]

No. 401.

v. Against an Auctioneer, for Selling on Credit against Orders.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant was engaged in the business of an auctioneer, and in consideration that the plaintiff would deliver to him [describe goods], to be sold by him for the plaintiff for a compensation, undertook as such, at the time and place aforesaid, to sell the same for cash, and not otherwise.

II. That the plaintiff delivered said goods to the defendant for that purpose.

III. That the defendant afterwards sold said goods on credit without the plaintiff's consent, and that the parties to whom such sale was made are and then were wholly in-

solvent, and the debt is of no value; to the plaintiff's damage dollars.

[*Demand of Judgment.*]

No. 402.

vi. *Against Auctioneer or Agent, for not Accounting.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., at, the plaintiff shipped from the port of, consigned to the defendant, then his agent, at, to sell for cash [describe the goods], of the value of dollars, and gave notice of said consignment to the defendant, which agency, for a valuable consideration, he undertook and entered upon.

II. That he received said goods, and thereafter sold the same, or some part thereof, on account of the plaintiff, for dollars.

III. That a sufficient and a reasonable time has elapsed since said goods were received and sold by defendant, yet he has neglected and refused, and still neglects and refuses to render to the plaintiff a just and true account of such sale, and of the proceeds thereof, and has also neglected and refused to pay over the proceeds to the plaintiff, to his damage dollars.

[*Demand of Judgment.*]

6. Agent.—In an action against an agent for not accounting, a request to account and pay over must be alleged in the complaint and proved at the trial: *Bushnell v. McCauley*, 7 Cal. 421. But the principal must make demand within a reasonable time if he has notice of the payment of money to his agent or attorney, and if he neglects to do so the statute of limitations will run: *Whitehead v. Wells*, 29 Ark. 99.

No. 403.

vii. *Against Forwarding Agent, for not Forwarding Goods as Agreed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant was a forwarding agent, and keeper of a warehouse, at, for the reception of goods intended to be forwarded by him, for hire, from to

II. That on the day of, the plaintiff de-

livered to the defendant certain merchandise, to wit [designate the same], the property of the plaintiff, of the value of dollars, which the defendant received and undertook, for hire, to forward in a reasonable time from to, by vessel, and meanwhile to store and safely keep the same.

III. That after the defendant received said goods, such a vessel did, within a reasonable time then following, to wit, on or about the day of, 187., sail from said to, and the defendant might and ought to have delivered the said goods to the master of such vessel for the purpose aforesaid.

IV. That the defendant not regarding his duty in that respect, did not do so, or otherwise forward said goods within a reasonable time, but kept and detained the same in his said warehouse, for a long and unreasonable time, to wit, four months, whereby the said goods perished, to the damage of the plaintiff dollars.

[*Demand of Judgment.*]

7. Forwarders are not Insurers.—Forwarders are not insurers, but they are responsible for all injuries to property while in their charge, resulting from negligence or misfeasance of themselves, their agents, or employees: *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11.

No. 404.

viii. *Against an Attorney, for Negligence in the Prosecution of a Suit.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and at the times hereinafter mentioned was an attorney of the Supreme Court of this State; that the plaintiff on or about the month of, 187., retained and employed him as such attorney, to prosecute and conduct an action in the District Court of the Judicial District, State aforesaid, on behalf of this plaintiff, against one A. B., for the recovery of dollars, due from him to this plaintiff, and the defendant undertook to prosecute said action in a proper, skillful, and diligent manner, as the attorney of the plaintiff.

II. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the day of

....., 187., but he so negligently and unskillfully conducted said action, that by his negligence, delay and want of skill, he did not obtain judgment until the day of, 187., and that meanwhile said A. B. had become insolvent; whereby the plaintiff was hindered and deprived of the means of recovering said sum of money, and that the same has not, nor has any part thereof been recovered or made by plaintiff, to his damage dollars.

[*Demand of Judgment.*]

8. Attorneys, Liabilities of.—An attorney is liable to his client for want of ordinary care, skill, diligence and integrity: *Gambert v. Hart*, 44 Cal. 542; see, also, as to what constitutes negligence: *Drais v. Hogan*, 50 Cal. 121. As to the law of Illinois regulating the liabilities of attorneys, see *Puterbaugh's Pl. and Pr.* 517.

9. Aver Generally that he was Retained.—In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained. But if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error: *Covillaud v. Yale*, 3 Cal. 108.

10. Case Decided.—Where in a suit a question has been made and decided by the Supreme Court, counsel cannot be charged with negligence in acting upon that decision as the law of the case: *Hastings v. Halleck*, 13 Cal. 203. Nor where he accepts as correct a decision of the Supreme Court of his own State in advance of any decision by the United States Supreme Court on the same subject: *Marsh v. Whitmore*, 21 Wall. 178.

No. 405.

ix. For Negligent Defense.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and at the times hereinafter stated was an attorney at law, and that the plaintiff, in the month of, 187., at, retained him as such, to defend on behalf of this plaintiff an action brought against him by A. B., then pending in the court of said State, for the recovery of dollars, and the defendant undertook to defend said action in a proper, skillful and diligent manner, as the attorney of the plaintiff,

II. That such proceedings were had in such action; that on or about the ... day of, 18., it became the duty of the defendant, as the attorney of this plaintiff, to

interpose an answer on his behalf to the complaint therein, but he wholly neglected so to do, and by reason thereof, and through his neglect, judgment by default was obtained against the plaintiff in said action, and by reason thereof this plaintiff was compelled to pay to the said A. B. dollars, the sum so recovered by him, and was put to costs and charges in his endeavor to defend such action, amounting to the sum of dollars, and lost the means of recovering the same back from said A. B., to the damage of the plaintiff in the sum of dollars.

[*Demand of Judgment.*]

11. Existence of Facts.—To charge an attorney with negligence, in failing to set up a defense based upon certain facts communicated to him by his client, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial, by the exercise of proper diligence on the part of his attorney; *Hastings v. Halleck*, 13 Cal. 203.

No. 406.

x. For Negligence in Examining Title.

[TITLE.]

The plaintiff complains, and alleges:

I. That at a time hereinafter mentioned, the plaintiff made a contract with one A. B. for the purchase from him of certain real property [describe the premises], for the sum of dollars, which property said A. B. assumed to have power to convey in fee, and clear of all incumbrances.

II. That the defendant was an attorney, and the plaintiff at, in the month of, 187., employed him as such to examine the title of A. B. to said property, and to ascertain if the title was good, and if any incumbrances existed thereon, and to cause and procure an estate therein, in fee-simple, and clear of all incumbrances, to be conveyed to the plaintiff, which the defendant, for compensation, agreed to do.

III. That the defendant negligently and unskillfully conducted such examination, and did not use endeavors to cause or procure a good and sufficient title, in fee, clear of incumbrances, to be conveyed to the plaintiff; but wrongfully advised and induced the plaintiff to pay said A. B. the sum of dollars, being said purchase-money of the premises, when in fact said A. B. had no title thereto [or

when said property was subject to incumbrances, specifying them and amount, and the plaintiff, in order to release the premises from said incumbrances, was obliged to pay the holders thereof the sum of dollars], to plaintiff's damage dollars.

[*Demand of Judgment.*]

12. Examining Title.—In an action against an attorney for negligence in examining title, it is not sufficient to allege that the property was incumbered. The declaration must show how the property was incumbered: *Elder v. Bogardus*, Hill & D. Supp. 116. The law implies that a person engaged in searching records and examining titles possesses the knowledge and skill requisite for the business and that he will use ordinary care; and for a failure in either of these respects he is liable to the party injured: *Chase v. Heaney*, 70 Ill. 268.

No. 407.

Against a Contractor, for Leaving the Street in an Insecure State, Whereby Plaintiff's Horse was Injured.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant had contracted with, to lay down pipes in and under the highway known as Street, in, for the purpose of supplying the said with gas, and to make the proper trenches for the purpose; and when such pipes were laid down, to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

II. That the defendant and his servants, on the day of, 187., took up part of the said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and materials of the said highway, and carelessly and negligently left the said highway in a dangerous and improper state, in consequence whereof a horse of the plaintiff, of the value of dollars, which he was then and there lawfully driving along the said highway, fell into and sunk therein, and was wounded and lamed, and rendered of no value, to plaintiff's damage dollars.

[*Demand of Judgment.*]

13. Acceptance.—After acceptance of the work or construction by the person for whom it was built, the owner becomes liable for subsequent injuries, and the liability of the contractor ceases: *Boswell v. Laird*, 8 Cal. 469.

*No. 408.**Against Municipal Corporation, for Damage done by Mob or Riot.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at and before the times hereinafter mentioned the plaintiff was the occupant of [state the building], and therein he conducted a business as [state business].

II. That on the day of, 187., a mob of disorderly and riotous persons collected together in said city and created a riot.

III. That on said day the rioters broke into the plaintiff's said premises, and carried away therefrom and destroyed his goods and merchandise.

IV. That the said defendants, though having due notice of the said riot immediately upon its breaking out, did not themselves protect the plaintiff's property, but neglected so to do.

V. That the value of his said goods and chattels so destroyed or injured by the said rioters was dollars, and he also sustained great damage by the breaking into his premises, and injury to the building, and the breaking up of his business for weeks thereafter, by reason of the destruction of his stock of goods, to wit, in the sum of dollars.

[Demand of Judgment.]

14. Action against City and County.—In an action against a city or county for damage to property caused by a mob or riot, an averment of the facts and the damage sustained by the plaintiff will be sufficient to sustain the action, and it is unnecessary for the plaintiff to negative negligence or carelessness on his own part: *Wolfe v. The Supervisors of Richmond Co.*, 19 How. Pr. 370; 11 Abb. Pr. 270. But if plaintiff has knowledge of the impending danger, and neglects to inform the authorities, it may be a valid defense: *Wing Chung v. Los Angeles*, 47 Cal. 531. As to liability of city and county, see *Darlington v. Mayor of N. Y.*, 28 How. Pr. 352; *Moody v. Supervisors of Niagara Co.*, 46 Barb. 659; *Schiellein v. Supervisors of Kings Co.*, 43 Barb. 490; *Blodgett v. City of Syracuse*, 36 Barb. 526.

15. Conflagration.—The constitutional provision that requires payment for private property taken for public use does not apply in the case of destroying a house to stop a conflagration. This right belongs to the State in virtue of her right of eminent domain: *Surocco v. Geary*, 3 Cal. 69. A city is not liable for the destruction of a building to prevent the spread of a fire, whether by private individuals or by order of the city authorities assuming to act officially: *McDonald v. City of Redwing*, 13 Minn. 38.

16. Damages, Rule of.—For damages in actions for injury to property, created by riots or mobs, the Civil Code, sec. 4452, merely gives a right of action, without prescribing any rules by which the amount of damages are to be assessed. For the measure of damages, therefore, in such actions we must look to the common law: See, also, Civil Code, secs. 3281 and 3333. The statute provides for damages for the destruction or injury of corporeal property only, not for injury to the “good will,” i. e., of a newspaper.

17. Public duty.—An action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty: *Pray v. Mayor of Jersey City*, 3 Vroom, 394.

No. 409.

Against a Railroad, for Killing Cattle.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant was a corporation duly organized under the laws of this State, and was owner of a certain railroad, known as the Railroad, together with the track, cars, locomotives, and other appurtenances thereto belonging.

II. That on the day of, 187., the plaintiff was the owner and possessed of certain cattle, to wit, five cows and two oxen [or any other stock, as the case may be], of the value of dollars, and which cows and oxen casually, and without the fault of said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant at

III. That the said defendants by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed said locomotives and cars, that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destroyed the same, to the plaintiff's damage dollars.

[Demand of Judgment.]

18. Allegation of Place.—A complaint in an action against a railroad company, to recover the value of animals killed on its track, which alleges that at the place and time when said animals were killed by the defendant's locomotive and cars the same was not securely fenced as required by law, sufficiently alleges that the railroad was not securely fenced at the place the cattle entered upon the track: *Indianapolis, etc., R. R. Co. v. Adkins*, 23 Ind. 340. A complaint against a railroad company, for stock killed by the machinery of the company, is bad, even after verdict, if it fail to aver negligence, or that the road was not fenced: *Indianapolis etc. R. R. Co. v. Brucey*, 21 Ind. 215.

19. Co-operating Negligence.—It has been held in New York that a railroad company is not liable for negligently running its engine upon and killing domestic animals found upon its road, unless its acts were heedless and wanton: See *Tonawanda R. R. Co. v. Munger*, 5 Den. 255. The reason of this rule is co-operating negligence of the owner of the animals; and the fact of the trespass of the animals on the property of the defendant constitutes a decisive obstacle to any recovery of damages for injury to them. It is, strictly speaking, *damnum absque injuria*: *Id.*; see also *Wilds v. Hudson Riv. R. R.*, 24 N. Y. 430. The general rule upon which the above decisions are founded, that a plaintiff cannot recover for the negligence of a defendant, if his own want of care or negligence has in any degree contributed to the result complained of, was approved in *Gay v. Winter*, 34 Cal. 153, for the reason that both parties being at fault, there can be no apportionment of the damages: 24 Vt. 494; and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, which would seem to be the true reason in the estimation of the New York courts: *Needham v. S. F. and S. J. R. R. Co.*, 37 Cal. 409.

20. Fence on Line of Road.—The provision of the law requiring railroad companies to fence along the line of their road may be waived by adjoining owners: *Enright v. S. F. and S. J. R. R. Co.*, 33 Cal. 230. A railroad is not bound to maintain a fence on the line of its road against cattle unlawfully in a pasture adjoining: *Mayberry v. Concord Railway*, 47 N. H. 391. A railroad company was required by statute to maintain "fences suitable for the security of the land-owner," on both sides of its road. Plaintiff's sheep having been suffered to go unlawfully on land adjoining said road, got through a defective part of the fence upon the road, and were killed by the train. It did not appear that the train was negligently managed: *Held*, that the company was not liable: *Eames v. Salem and Lowell R. R. Co.*, 98 Mass. 560; see *Toledo, Wabash and W. R. R. Co. v. Fergusson*, 42 Ill. 449; *Price v. N. J. R. R. and T. Co.*, 3 Vroom, 19. Otherwise, if the company was grossly negligent: *Illinois Cent. R. R. Co. v. Wren*, 43 Ill. 77.

21. Insufficient Barway.—If an insufficient barway is placed by a railroad company in a fence on the line of its road, at the request of and for the use of the owner of adjoining land, and he uses the same and does not complain of its insufficiency, or notify the company to alter it, the company is not liable for damages for injuries to his cattle, happening in consequence of the barway being too low to turn cattle: *Enright v. S. F. and S. J. R. R. Co.*, 33 Cal. 230.

22. Must Show Defendant to be in Default.—A complaint for injury by negligence must show the defendant to be in actual default, or it will not be sustainable: *Taylor v. The Atlantic Mutual Insurance Co.*, 2 Bosw. 106.

23. Negligence Defined.—Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but always relative to some circumstance of time, place or person: Broom's Leg. Max. 329; *Richardson v. Kier*, 34 Cal. 63. Negligence is a violation of the obligation which enjoins care and caution in what we do; but this duty is relative, and where it has no existence between particular parties there can

be no such thing as negligence in the legal sense of the term: *Tonawanda R. R. Co. v. Munger*, 5 Den. 255.

24. Negligence, Proximate and Remote.—When the negligence of the defendant is proximate, and that of the plaintiff remote, the action can be sustained, although the plaintiff is not entirely without fault: *Miss. Cent. R. R. Co. v. Mason*, 51 Miss. 234. So, in the case of injury to a domestic animal by an engine and train, if the plaintiff were guilty of negligence, or even of positive wrong in placing his horse on the road, the defendants were bound to exercise a reasonable care and diligence in the use of their road and management of their train, and if for the want of that care the injury arose, they are liable: *Needham v. S. F. and S. J. R. R. Co.*, 37 Cal. 409; citing *Kerwhaker v. C. C. and C. R. R. Co.*, 3 Ohio St. 172; *C. C. and C. R. R. Co. v. Elliott*, 4 Id. 474; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 246; *Davies v. Mann*, 10 Id. 546; *Illidge v. Goodwin*, 5 C. & P. 190; *Mayor of Colchester v. Brooke*, 53 E. C. L. 376; and see also *Kline v. C. P. R. R. Co.*, 37 Cal. 400. The negligence which disables a plaintiff from recovering, must be a negligence which directly, or by natural consequence, conduced to the injury: *Richmond v. Sac. Val. R. R. Co.*, 18 Cal. 351. Where, by the negligence of a railroad company, a fire is communicated by the sparks of an engine to the premises of one person, and spreads to those of another, the railroad company is liable for the injury to such second person, if the damage is the natural or direct consequence of the original firing: *Henry v. S. P. R. R. Co.*, 50 Cal. 176; see also *Perry v. S. P. R. Co.*, Id. 578.

25. Negligence—How Alleged.—Negligence is a question of fact, or mixed law and fact; and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence: *McCauley v. Davidson*, 10 Minn. 418. Where the negligence consists in the omission of a duty, the facts which are relied on must be alleged: *City of Buffalo v. Holloway*, 7 N. Y. 493; affirming *S. C.*, 14 Barb. 101; *Taylor v. Atlantic Mutual Ins. Co.*, 2 Bosw. 106; *Congreve v. Morgan*, 4 Duer, 439; *Seymour v. Maddox* 16 Q. B. 326; *S. C.*, 71 Eng. Com. L. R. 326; and see *McGinity v. Mayor, etc.*, 5 Duer, 674.

26. New York Rule Discussed.—The New York courts seem to ignore all distinction between cases where the negligence of the plaintiff is proximate and where it is remote; and in not limiting the rule of liability, which they announce, to the former: *Needham v. S. F. and S. J. R. R. Co.*, 37 Cal. 409. The false reasoning of the New York courts upon this question has been ably discussed by the Supreme Court of Connecticut, in the case of *Isbell v. N. Y. and N. H. R. R. Co.*, 27 Conn. 404, where it says: A remote fault in one party, does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. So, also, see the Supreme Court of Vermont, in the case of *Trow v. Vermont Central R. R. Co.*, 24 Vt. 494; where the distinction between "proximate" and "remote" negligence is clearly defined: See, also, sustaining these principles, *Hill v. Warren*, 2 Stark. 377; 7 Met. 274; 12 Id. 415; 5 Hill, 282; 6 Id. 592; *Williams v. Holland*, 6 C. & P. 23.

27. Parties Plaintiff.—A party in the actual possession of cattle at the time of the injury can maintain an action for an injury to them while in his possession: *Polk v. Coffin*, 9 Cal. 56.

28. Several Acts of Negligence.—Where several acts of negligence cause but one injury, the plaintiff may allege all the acts of negligence in one count, and aver that they were the cause, and any one of them proved upon the trial will sustain his complaint: *Dickens v. N. Y. Central R. R. Co.*, 13 How. Pr. 228.

29. When Liable.—In this State, a railroad company is responsible for damages done cattle by running over them on the track, if the accident could have been avoided by ordinary care and prudence on the part of the company, and this though the owner of the cattle permits them to run at large near the line of the railroad: *Richmond v. Sac. Val. R. R.*, 18 Cal. 351. But if they could not by ordinary care and prudence avoid the accident, they are not liable: *Id.*

No. 410.

For Kindling a Fire on Defendant's Land, whereby Plaintiff's Property was Burned.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff was possessed of about acres of land, in, on which there was an orchard and fences, and also a barn containing tons of hay.

II. That the defendant on that day intentionally kindled a fire on his land next adjoining to the plaintiff's, and at the distance of yards therefrom, and so negligently watched and tended the said fire that it came into the plaintiff's said land, consumed said barn and hay of the value of dollars, and also [state special damage].

[Demand of Judgment.]

30. Against Railroad Companies.—The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is *prima facie* proof of negligence sufficient to go to the jury; *Hull v. Sac. Val. R. R. Co.*, 14 Cal. 387. And the fact that a railroad company permits dry grass, which will readily take fire, to remain on its track, is competent evidence on the question of negligence, although not negligence *per se*: *Perry v. S. P. R. R. Co.*, 50 Cal. 578; see, also, *Cleland v. Thornton*, 43 Id. 437. Under a statute making railroad companies liable for fires "communicated" by their engines, a railroad company is liable for the destruction of woods half a mile from its track, by a fire started by a spark from one of its engines, and spreading across land of different proprietors, and a highway, in a direct line to said woods: *Perley v. Eastern R. R. Co.*, 98 Mass. 414; see, also, *Illinois Cent. R. R. Co. v. McClelland*, 42 Ill. 355; *Same v. Mills*, Id. 407.

*No. 411.**For Chasing Plaintiff's Cattle.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant chased and drove about [describe the cattle] of the plaintiff.

II. That by reason thereof, the said [describe the cattle] of the plaintiff, of the value of dollars, were greatly damaged and injured, and of them died, and the residue of them were injured and rendered of no value to the plaintiff, to plaintiff's damage in dollars.

[Demand of Judgment.]

*No. 412.**For Keeping Dog Accustomed to Bite Animals.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant wrongfully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite [sheep and lambs, or as the case may be].

II. That on the day of, 187., at, the said dog, while in the keeping of the defendant, attacked and bit [or hunted, chased, bit, and worried], [sheep or lambs, or as the case may be], of the plaintiff.

III. That in consequence thereof, the said [sheep and lambs, or as the case may be], of the plaintiff, of the value of dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, to his damage dollars.

[Demand of Judgment.]

31. Joint Action.—In New York, a joint action does not lie against the joint owners of dogs, by whom the sheep of a third person have been worried and killed: *Van Steenberg v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495.

32. Ownership.—It is not necessary to prove that the defendant owned the dog. It is sufficient to prove that the defendant kept the dog: *Wilkinson v. Parrott*, 32 Cal. 102.

33. Vicious Habits.—When injury to plaintiff's horse was inflicted by that of the defendant, while trespassing, it was held unnecessary to make any averment of vicious habits: *Dunckle v. Kocker*, 11 Barb. 387; *Popplewell v. Pierce*, 10 Cush. 509.

No. 413.

For Shooting Plaintiff's Dog.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant maliciously shot and killed a dog, the property of the plaintiff, of the value of dollars, to the damage of the plaintiff dollars.

[Demand of Judgment.]

No. 414.

For Untying Plaintiff's Boat, by Reason of which it was Carried by the Current against a Bridge, and Injured.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff was possessed of a fishing boat, called [etc.], of the value of dollars.

II. That the defendant maliciously untied said boat, and it therefore floated with the stream against a bridge, and was thereby broken and destroyed, to the damage of the plaintiff dollars.

[Demand of Judgment.]

34. Collision.—In case of collision occasioned by the fault of a vessel under compulsory pilotage, in going at too great speed, where no contributory negligence on the part of the master or crew is proved, the owners of the vessel are not liable: *G. S. N. Co. v. B. & C. S. N. Co.*, L. R. 4 Exch. 238. When a vessel is properly in charge of a licensed pilot, the owner is not responsible for damages which may ensue from the negligence or misconduct of the pilot: *Griswold v. Sharpe*, 2 Cal. 17.

No. 415.

For Flowing Water from Roof on Plaintiff's Premises.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff was lawfully possessed of a dwelling-house and premises, in the county aforesaid, and in which the plaintiff and his family then lived.

II. That the defendant wrongfully erected a building near the said dwelling-house of the plaintiff, in so careless and improper a manner, that by reason thereof, on said day, and at other times afterwards, and before this action, large quantities of rainwater ran from said building upon and into the said dwelling-house and premises of the plaintiff, and the walls, ceilings [or otherwise state damage done, according to the fact], and other parts thereof were thereby wet and damaged, and became not fit for habitation, to the damage of plaintiff in dollars.

[*Demand of Judgment.*]

No. 416.

For Negligence of Mill Owners, whereby Plaintiffs' Land was Overflowed.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187..., the plaintiffs were, and still are the owners of a valuable mining claim [or otherwise designate the property], situated at, upon which they had bestowed great labor in putting the same in working order.

II. That at the same time the defendants were the owners of [or were possessed of and using] a reservoir situated on, wherein they collected a large body of water which would otherwise have flowed down the said stream, and were engaged in furnishing such water to miners and others, by means of a ditch or canal.

III. That afterwards, on the day of, 187..., the plaintiffs were engaged in their work as aforesaid, and the defendants' said reservoir, by reason of some defect in its construction, or insufficiency for the purpose for which it was constructed, broke away, discharging an immense and unusual body of water, which they had collected in said reservoir; which said water so discharged flowed in and upon plaintiffs' mining claim [or as the case may be], filling the same with large quantities of earth, stone and rubbish, to the damage of plaintiffs in dollars.

[*Demand of Judgment.*]

35. Avoidance of Injuries.—The fact that plaintiffs could have prevented the damage by pulling off a board from defendant's flume is no defense, because they were not obliged to avoid the injuries complained of by committing a trespass: *Wolfe v. St. Louis Ind. Water Co.*, 15 Cal. 319.

36. Construction of Water Ditch.—The question of negligence in the management of a water ditch, and the degree of it must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam: *Wolfe v. St. Louis Independent Water Co.*, 10 Cal. 541. The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors: *Fraler v. Sears Union Water Co.*, 12 Cal. 555. In consequence of the negligent construction of a cut made by the defendants, the waters of a neighboring river flooded the adjoining land. The plaintiff owning land east of the cut closed the culvert to prevent his land being flooded; but the owners on the west, reopened it and the plaintiff's land was flooded in consequence: *Held*, that defendants were liable for the whole damage, whether the opening was right or wrong: *Collins v. Middle Level Commissioners*, L. R., 4 C. P. 279.

37. Defect in Construction of Dam.—In an action for damages for breaking defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants broke away," etc.: *Held*, that the complaint is sufficient: *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material under our system of pleading, to require separate counts: *Id.*

38. Degree of Care Necessary.—In an action to recover damages for an alleged injury to plaintiff's land, resulting from the careless management of defendant's water ditch, which traversed the land: *Held*, that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs, under similar circumstances: *Campbell v. B. R. and Aub. W. and M. Co.*, 35 Cal. 679.

39. Form of Complaint.—A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water ditch for the purpose of conveying water, and at which time and place the defendants were also the owners of a certain other water ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage \$3,000, and thereof they bring suit, is sufficient: *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.

40. Mining.—If a party engaged in coal mining causes water with earth and refuse to descend upon the land of another so as to destroy the value of such land for cultivation, as the direct result of the act of the miner and not the result of the law of gravitation, the person whose land is injured may recover damages: *Robinson v. Black Diamond Coal Co.*, 50 Cal. 460; *Smith v. Fletcher*, L. R., 7 Exch. 305.

*No. 417.**For Undermining Plaintiff's Land.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the plaintiff was possessed of certain land, a part of his farm in the Town of, etc. [briefly describe].

II. That in the month of, 187., the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land, without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way, to the damage of plaintiff in dollars.

[Demand of Judgment.]

*No. 418.**For Undermining Plaintiff's Building.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, plaintiff was possessed of certain land, with buildings thereon [briefly describe the premises], which were supported by the adjacent land and the soil thereof, and that the plaintiff was entitled to have them so supported.

II. That on the day of, 187., the defendant wrongfully and negligently excavated the land adjacent to plaintiff's said land and buildings, and removed the earth therefrom, without leaving sufficient support for the plaintiff's said land and buildings, by reason whereof the same sank and gave away, and the house fell in and was destroyed, and the furniture of the plaintiff was damaged and broken; and the plaintiff was compelled to pay dollars, in procuring another house, and dollars in removing and repairing his goods, and dollars in removing the ruins of the house and rebuilding the same, to his damage in dollars.

[Demand of Judgment.]

41. Reversioner, Allegation by.—That at the times hereinafter mentioned, the plaintiff was, and still is owner of certain land [briefly describe the same], which was then in the occupation of A. B., as tenant thereof to the plaintiff.

*No. 419.**For not Using Due Care and Skill in Repairing.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a watchmaker, at, and on the . . . day of, 187., the plaintiff delivered to him, as such, a gold watch of the plaintiff, of the value of dollars, to be repaired by the defendant, for reward.

II. That the defendant then and there undertook said employment, and to use due care and skill in repairing said watch, and to take due care thereof while in his possession, and to re-deliver the same to the plaintiff on request.

III. That the defendant did not take proper care of the said watch whilst in his possession, and did not use due care or skill in repairing the said watch, but on the contrary, did his work in so careless and unworkmanlike a manner that no benefit was derived therefrom, and the said watch was broken and rendered worthless, to the damage of the plaintiff dollars.

[Demand of Judgment.]

*No. 420.**Against Watchmaker, for not Returning Watch.*

[TITLE.]

The plaintiff complains, and alleges:

I. [As in form 419].

II. [As in form 419].

III. That after a reasonable time for the repair of said watch, and on or about the . . . day of, the plaintiff requested the defendant to re-deliver the said watch; but he refused so to do, to the damage of the plaintiff dollars.

[Demand of Judgment.]

CHAPTER IV.

SLANDER OF TITLE.

*No. 421.**Common Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., he was the owner in fee of [state what property], situate in, [describe it particularly].

II. That on that day, at, the defendant, maliciously and without cause, spoke in the presence of A. B. and others [name them], the following words concerning the plaintiff and his property [insert the exact language with innuendoes].

III. That the said words were false.

IV. That said A. B. [or others, naming them], were then and there negotiating for the purchase of said premises, and that by reason thereof said A. B. [or others], was dissuaded from making such purchase.

V. That by reason of the said words, the said A. B. refused and still refuses to purchase the said property from the plaintiff, and the plaintiff has been by reason thereof unable to sell the same, and has been otherwise greatly injured thereby to the damage of the plaintiff dollars.

[Demand of Judgment.]

1. Action in General.—As to the action for slander of title in general, *Gerard v. Dickenson*, 4 Coke, 18; *Hargrave v. Le Breton*, Burr. 2422; *Earl of Northumberland v. Byrt*, Cro. Jac. 163; *Vaughan v. Ellis*, Id. 213; *Smith v. Spooner*, 3 Taunt. 246; *Pitt v. Donovan*, 1 Maule & S. 639; 2 Greenl. Ev. 428. As to what plaintiff must establish, see *Like v. McKinstry*, 41 Barb. 186; see, also, Townshend on Sland. and Lib. p. 240; and 1 Stark on Sland. 101.

2. Damage.—The damage sought to be recovered must be specially alleged in the complaint, and substantially proved on the trial. It must be a pecuniary damage, and must be the natural and legal consequence of the wrong: *Kendall v. Stone*, 2 Sandf. 269; 5 N. Y. 14. When the damages arise from the plaintiff's being precluded from selling or mortgaging the property which is the subject of the slander, it is essential in stating a cause of action to name the person or persons who refused from that cause to loan or purchase. An omission to do so will render the complaint demurrable: *Linden v. Graham*, 1 Duer, 670; N. Y. Leg. Obs. 185.

3. Essential Averments.—To maintain an action for slander of title to lands, the words must be false, must be uttered maliciously, and be followed as a natural and legal consequence by a pecuniary damage, which must be especially alleged and proved: *Kendall v. Stone*, 1 Seld. 14; reversing S. C., 2 Sandf. 269; see *Like v. McKinstry*, 41 Barb. 186. And the name of the person, as above stated, who refused to purchase or make the loan or purchase in consequence of the slander, should be stated in the complaint: 3 Bing. (N. C.) 371; Cro. Car. 140; Cro. Jac. 484; 3 Keb. 153; Style, 169; 5 N. Y. 14; 4 Wend. 537; Saund. Pl. & Ev. 243; 1 Hall, 399; *Linden v. Graham*, 1 Duer, 670; *Bailey v. Dean*, 5 Barb. 297.

4. False Statement in Regard to Patent and Manufactures. — For complaint in an action to recover damages for false statements made by the defendants, in regard to patent and manufactures of the plaintiff, to the injury of his business, see *Snow v. Judson*, 38 Barb. 210.

5. Malice.—It is error for the court to instruct the jury that where a person injuriously slanders the title of another, malice is presumed, or that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature: *McDaniel v. Baca*, 2 Cal. 326. Malice and damage are both essential requisites to sustain an action for language concerning a thing. To these requisites are usually added a third, that the language is false: Townshend on Sland. and Lib. 239.

6. Probable Cause—Special Damages.—To sustain an action for slander of title, there must be want of probable cause, and special damages must be alleged, and that circumstantially. A general allegation of loss will not be sufficient. Nor will a defendant be responsible for what he says or does in pursuance of a claim of title in himself, provided there be good ground for such claim: *Bailey v. Dean*, 5 Barb. 297. The averment that it was without probable cause is proper.

7. Restriction of Action.—The action for slander of title is not restricted to language affecting real property. It lies for slander of title to personal property: Townshend on Sland. and Lib. 245.

8. Slander of Title Defined.—Slander of title is publishing language, not of the person, but of his right or title to something: Townshend on Sland. and Lib. 240.

9. When Action will Lie.—When a party is prevented from selling, exchanging, or making any advantageous disposition of lands or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience which he has suffered, but special damage must be shown: 1 Starkie on Sland. 191.

CHAPTER V.

TRESPASS.

*No. 422.*i. *For Malicious Injury, Claiming Increased Damages under the Statute.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant maliciously and wantonly destroyed certain ornamental trees, of the value of dollars, the property of the plaintiff, growing upon his land [or as the case may be], at [by barking and girdling them, or otherwise state nature of injury, if not totally destroyed], contrary to the form of the statute in such case made and provided.

[Demand of Judgment for Treble Damages.]

1. **Abatement of Action.**—A trespass dies with the trespasser: *O'Conner v. Corbitt*, 3 Cal. 370. But section 1584 of the Code C. P., has changed the rule. It provides that: "Any person, or his personal representatives, may maintain an action against the executor or administrator of any testator or intestate, who, in his life-time, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person."

2. **Agent.**—If the trespass has been committed by one acting as the agent of the defendant, it may be so alleged: *St. John v. Griffith*, 1 Abb. Pr. 39. Where two of the defendants actually committed the act, and a third defendant instigated and employed them to do it, it may be so alleged: *Ives v. Humphreys*, 1 E. D. Smith, 196.

3. **Assignee.**—That an assignee in trust for the benefit of creditors may maintain an action of trespass against any person who interferes with the assigned property: See *McQueen v. Babcock*, 41 Barb. 337. A claim for damages caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same: *Moore v. Massini*, 32 Cal. 590.

4. **Co-Trespassers—Allegation of.**—If it be sought to charge another with the trespass, at whose instigation and request the trespass was committed singly, it may be alleged as follows: "That on the, etc., one A. B., at the instigation and request of the defendant, and being by him employed thereto and assisted therein, broke and entered," etc. Or, if it be sought to make both co-trespassers, it may be alleged: "That on, etc., the defendant A. B., at the instigation and request of the defendant, C. D., being by him employed thereto and assisted therein, broke and entered," etc.: *Ives v. Humphreys*, 1 E. D. Smith, 196. For "all persons who direct or request another to commit a trespass, are liable as co-trespassers:" 2 Hill. on Torts, 293; *Herring v.*

Hoppock, 15 N. Y. 413. Where a trespass has been committed by two or more, by joint act or co-operation, they are all trespassers, and liable jointly or severally, even to the extent of exemplary damages: 2 Hill. on Torts, 292; *Hair v. Little*, 28 Ala. 236. If they acted in concert, or the act of one naturally produced the act of the other: *Brooks v. Ashburn*, 9 Geo. 297; *Sutton v. Clark*, 6 Taunt. 29. Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved: *McCarron v. O'Connell*, 7 Cal. 152.

5. Damages—Exemplary and Vindictive.—Exemplary or vindictive damages cannot be recovered for a trespass not malicious in its character: *Seldon v. Cashman*, 20 Cal. 56. And the rule of damages depends upon the presence or absence of fraud, malice, or oppression: *Dorsey v. Manlove*, 14 Cal. 553. In the absence of such circumstances the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner: *Dorsey v. Manlove*, 14 Cal. 553. A party committing a trespass can be made liable for such damages only as are the proximate result of the trespass: *Story v. Robinson*, 32 Cal. 205. The right of the plaintiff to recover damages is not affected by the fact that the trespass was not willful: *Maye v. Yappan*, 23 Cal. 306. Where trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of mere compensation is not enforced, and punitive or exemplary damages may be enforced: *Dorsey v. Manlove*, 14 Cal. 553; see Civ. Code, sec. 3294 and 3346.

6. Designation of Land.—The lines of a quarter section of government land, distinctly marked by natural boundaries and stakes placed at convenient distances, so that the lines can be readily traced, are sufficient to authorize an action for trespass thereon under the provisions of the Act of April 11, 1850: *Taylor v. Woodward*, 10 Cal. 90; see the case of *Stockton v. Garfrias*, 12 Cal. 315. When two mining claims adjoin each other, the ignorance of the owners of one company of the dividing line will not excuse a trespass upon the land of the other: *Maye v. Yappan*, 23 Cal. 306; see *Nevada County and Sac. Canal Co. v. Kidd*, 37 Cal. 282. Where the town is subdivided intermediate the trespass and the commencement of the action, the trespass may be laid to have been done in the original town: *Renaudet v. Crocken*, 1 Cai. 167; S. C., Col. & C. Cas. 219.

7. Ditch.—A person has no right to run a ditch through the inclosure of another, without his consent: *Weimer v. Lowery*, 11 Cal. 104.

8. Entry without Force.—When the complaint charges an entry upon and injury to plaintiff's property, and does not charge force, the issue was held to be confined to the actions of the party after the entry, and to the damages resulting from the same: *Turner v. McCarthy*, 4 E. D. Smith, 247.

9. Equitable Relief.—In an action for trespass, the law and equity must not be inseparably mixed together. The allegations must be separate, distinct, certain: See *Gates v. Kieff*, 7 Cal. 124. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off, and the bill in equity begins: *Id.*

10. Essential Facts.—As to the essential facts to maintain the action: See *Willard v. Warren*, 17 Wend. 257. When a pleader wishes to avail himself of any statutory privilege or right, given by particular facts, those facts which the statute requires as the foundation of the right must be stated in the complaint: *Dye v. Dye*, 11 Cal. 163.

11. Estate in Possession, Reversion and Remainder.—In New York, any person seised of an estate in possession, remainder, or reversion, may bring an action under the statute, notwithstanding any intervening estate for life or years: *Van Deusen v. Young*, 29 Barb. 9.

12. Forcible and Unlawful.—The acts alleged must be essentially acts of trespass, forcible and unlawful, but it need not be alleged that the entry was unlawful: *Van Deusen v. Young*, 29 Barb. 9.

13. Foreign Miners.—The fact that parties are foreigners, and have not obtained a license to work in the mines, affords no apology for trespass: *Mitchell v. Hagood*, 6 Cal. 148.

14. Joinder of Cause.—In a complaint for trespass the plaintiff claimed \$500, and alleged value of the property destroyed, and \$500 damages. Defendant demurred on the ground that two causes of action were improperly joined, and the court below sustained the demurrer: *Held*, that this was error: *Tendesen v. Marshall*, 3 Cal. 440. In an action of trespass, an allegation of injury to the "site for a dam," and "dam in course of construction thereon," and "site for a canal, and canal thereon projected, surveyed and commenced," constitutes but a single cause of action. They are land, and for the purposes required must necessarily be connected and continuous: *Nev. Co. and Sac. Canal Co. v. Kidd*, 37 Cal. 309. But the water right when acquired, although intimately related to and connected with the site for a canal and dam, and canal commenced, etc., give rise to separate and distinct causes of action: *Id.* The owner of land may join in the same complaint, a claim for damages as assignee, caused as a trespass on the land while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land: *Moore v. Massini*, 32 Cal. 590. A party cannot join an action of trespass *quare clausum fregit* with ejectment, and pray for an injunction: *Bigelow v. Gove*, 7 Cal. 133.

15. Joinder of Parties.—A plaintiff cannot by mere notice bring in parties not sued in an action of trespass when there is no pretense that they were trespassers: *Pico v. Webster*, 14 Cal. 202. In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are jointly liable as joint trespassers: *Lewis v. Johns*, 34 Cal. 629; as to parties defendant, see Vol. i., p. 103-4.

16. Jurisdiction.—District courts have jurisdiction of all actions to recover damages for trespass upon lands if the right of possession is put in issue regardless of the amount of damages claimed: *Cullen v. Langridge*, 17 Cal. 67; Code C. P., sec. 57.

17. Mining Claim.—In an action for a trespass upon a mining claim, where the complaint avers that the defendants are working upon and extracting the mineral from the claim, and prays for a perpetual injunction, and the answer admits the entry and work, and takes issue upon the title of the mine, and the jury find in favor of the plaintiffs, the court should decree the equitable relief sought, and enjoin defendants from future trespasses: *McLaughlin v. Kelly*, 22 Cal. 211.

18. Ouster.—No ouster is necessary to maintain an action of trespass. Any unlawful entry is enough: *Rowe v. Bradley*, 12 Cal. 226.

19. Party Wall.—For averments on a complaint for undermining the party wall of plaintiff's house, see 4 Duer, 53. For averments of complaint for an injunction restraining defendant from excavating to undermine plaintiff's land, see *Farrand v. Marshall*, 19 Barb. 380.

20. Possession and Right of Possession.—In an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises; and his right to the possession is not involved unless the defendant tenders an issue upon the fact, and in that case (*Holman v. Taylor*, 31 Cal. 338) the right of recovery depends both on possession in fact and the right of possession: *Pollock v. Cummings*, 38 Cal. 683. Possession in the plaintiff is sufficient to enable him to maintain an action for trespass, and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages: *McCarron v. O'Connell*, 7 Cal. 152; *Bequette v. Caulfield*, 4 Id. 278; *Fitzgerald v. Urton*, 5 Id. 308; *Palmer v. Aldridge*, 16 Barb. 131, and cases cited; *Hall v. Warren*, 2 McLean, 332. The defendant has no right to inquire into the good faith of plaintiff's possession: *Eberhard v. Tuol. Water Co.*, 4 Cal. 308. To maintain an action of trespass *quare clausum fregit*, it was formerly held necessary for the plaintiff to establish an actual possession of the *locus in quo*, but under more modern decisions a constructive possession is held sufficient: See *Nev. Co. and Sac. Canal Co. v. Kidd*, 37 Cal. 282. Actual possession is sufficient to maintain such action against a mere stranger or intruder. That possession by the tenant is possession by the plaintiff sufficient to support this averment, see *Sumner v. Tiletton*, 7 Pick. 198. It is enough to show possession at the time of the injury: *Vowles v. Miller*, 3 Taunt. 137.

21. Statute.—For injuries to trees, timber or underwood, and damages therefor, see Civil Code, sec. 3346. As to ownership of trees in or along a highway, see Political Code, sec. 2631. As to ownership of trees whose trunks stand wholly upon the land of one, though the roots grow into the land of another: See Civil Code, sec. 833. As to line trees: Id. sec. 834.

22. Tearing down Gate.—If the complaint in an action for an alleged trespass avers that defendants unlawfully entered on plaintiff's land and tore down a gate, the gist of the action is the entry, and the removal of the gate is a mere matter of aggravation, and if the plaintiff fail to prove the gist he cannot recover for the aggravation: *Pico v. Colimas*, 32 Cal. 578.

23. Tenants in Common.—Ordinarily and at common law trespass will not lie by one tenant in common against his co-tenant; but when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party: Co. Lit. 200, a, b; Crabbe's Laws of R. P., sec. 2318 b; 1 Ld. Raym. 737. But one tenant in common cannot maintain trespass against another for taking in the ordinary course the whole profits of the land; *Jacobs v. Seward*, L. R. 4 C. P. 328. If title is alleged, a general averment will be sufficient, without setting out the source of title: *Daley v. City of St. Paul*, 7 Minn. 390. And the allegation of title sufficiently imports possession in an action of trespass on land: *Cowenhoven v. City of Brooklyn*, 38 Barb. 9. A judgment in trespass does not necessarily determine the title to the property: *Brennan v. Gaston*, 17 Cal. 372. The personal action cannot

be made to test the title of the property as between conflicting claimants: *Halleck v. Mixer*, 16 Cal. 574; see *Nevada Co. and Sac. Canal Co. v. Kidd*, 37 Cal. 282.

24. Turning out Cattle.—One who commits a trespass by turning cattle out of an inclosure upon the public lands, cannot be made liable to the owner for the loss of the cattle, if the owner has been notified to take care of them: *Story v. Robinson*, 32 Cal. 205.

25. Unlawful.—The acts alleged must be essentially acts of trespass, forcible and unlawful; but it need not be alleged in so many words that the entry was unlawful: *Van Deusen v. Young*, 29 Barb. 9.

26. Who may Maintain Action.—Any person seised of an estate in remainder or reversion may bring an action under it, notwithstanding any intervening estate for life or years: *Van Deusen v. Young*, 29 Barb. 9. The plaintiff is not entitled to recover damages for a trespass *quare clausum fregit*, alleged in his complaint to have been committed on his own land, when in fact the trespass was committed on another piece of land: *Doherty v. Thayer*, 31 Cal. 140. An action can be maintained by the mortgagee of real estate, to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired: *Robinson v. Russell*, 24 Cal. 467.

27. "With Force and Arms," "Broke and Entered."—Under our system of pleading, the words, "with force and arms, broke and entered," do not confine the proof to the direct and immediate damage, as in the old action of trespass, and the facts being clearly set out in the complaint, an addition of these words was surplusage: *Darst v. Rush*, 14 Cal. 81.

No. 423.

For Damages for Injuring Trees.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the day of.....; 187., entered upon the land of the plaintiff, in the county of, the same being then in the possession of the plaintiff, and did, without the leave of the plaintiff, cut down..... trees [designate number and kind of trees], of the value of dollars; whereby the plaintiff lost said trees, and the land belonging to the plaintiff was greatly damaged and lessened in value, to the amount of dollars; and thereby the defendant, by the force of section of the statute of, forfeited and became liable to pay to the plaintiff treble the amount of said damages.

[Demand of Judgment.]

28. Action can be Maintained as soon as Timber is Cut.—An action of trover may be maintained against a trespasser who is cutting timber, as soon as timber is cut: *Sampson v. Hammond*, 4 Cal. 184.

29. Between Tenants in Common.—At common law, when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party: Co. Lit. 200 a, b; Crabbe's Law of R. P., sec. 2318 b; 1 Ld. Raym. 737. If one tenant in common destroy the thing in common; as, if he grub up and destroy a hedge, or prevent his co-tenant of a fold from erecting hurdles, trespass lies: Browne on Actions, 414; Gow, 201; 8 B. & C. 257. If one tenant in common enters upon his co-tenant, and ousts him of his premises, trespass *quare clausum fregit* lies for the injury: 7 Cow. 229. Hence, an action will lie for injury to trees standing on a line between plaintiff's and defendant's lands, whether the parties be regarded as tenants in common of such trees or not: *Dubois v. Beaver*, 25 N. Y. 123.

30. Demand.—Where trespassers cut wood on land belonging to the plaintiff, and sold it to the defendants, who were *bona fide* purchasers: *Held*, that no previous demand was requisite to sustain an action for the recovery of the wood or its value: *Whitman G. and S. M. Co. v. Tritle*, 4 Nev. 494.

No. 424.

The Same—For Cutting and Converting Timber.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant forcibly broke and entered upon the plaintiff's land [the same being then in possession of the plaintiff], and there cut down and carried away the trees and timber of the plaintiff, of the value of dollars, and converted and disposed of the same to his own use, contrary to the statute, etc., to the damage of the plaintiff in the sum of dollars.

[Demand of Judgment.]

31. Action Lies.—An action for trespass lies for cutting and carrying away timber: Cal. Code C. P. sec. 733. Though the land be not inclosed: *Wells v. Howell*, 19 Johns. 385; *Tonawanda R. R. Co. v. Munger*, 5 Den. 255.

32. Actual Possession.—In actions for damages for injury to real property, title or actual possession at the time of the injury must be shown: *Gardner v. Heart*, 1 N. Y. 528.

33. Broke Plaintiff's Close.—It is not necessary to state the defendant broke the plaintiff's close: *Wells v. Howell*, 19 Johns. 385; and see *Tonawanda R. R. Co. v. Munger*, 5 Denio, 259.

34. Damages.—Triple damages may be assessed for cutting and carrying away trees, etc.: Cal. Code C. P., sec. 733. But nothing in section 733 authorizes the recovery of more than the just value of the timber taken from uncultivated wood land, for the repair of a public highway or bridge upon the land, or adjoining it: Cal. Code C. P., sec. 734. The damages should be estimated by all the circumstances and the purpose for which such trees were used: *Chipman v. Hibberd*, 6 Cal. 162. The measure of damages is not the value of such trees, as for wood, but the injury done to the land by destroying them: *Id.*

35. Damages—Treble.—To entitle to treble damages under the statute, the complaint must refer to the act: *Brown v. Bristol*, 1 Cow. 176. As to pleading statutes, see vol. 1, pp. 195–8. In actions for waste, when treble damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either cite the statute, or conclude, to the damage of the plaintiff against the form of the statute: *Chipman v. Emeric*, 3 Cal. 283; 5 Cal. 239. The complaint must also aver that the defendant cut them knowingly, willfully or maliciously, in order to recover treble damages: *Barnes v. Jones*, 51 Cal. 303. Without such averment the plaintiff may recover simple damages: *Id.*

36. Executor.—Under our statute, an executor may maintain an action for trespass committed upon the real estate of his testator in his life-time: Code C. P., sec. 1684; *Haight v. Green*, 19 Cal. 113. For averments of complaint by executors, where third persons wrongfully cut timber, and defendants afterwards entered and removed it: See *Halleck v. Mixer*, 16 Cal. 574.

37. Injunction.—A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct: *Gates v. Kieff*, 7 Cal. 125. An injunction will not be dissolved, restraining defendants from felling trees, where the question of boundary is in dispute; especially where the defendant's bond will fully protect the defendant for any delay, if it should turn out that they have the right: *Buckelew v. Estell*, 5 Cal. 108; see "Injunction," *post*.

38. Public Lands.—Prior possession of public lands will entitle the possessor to maintain an action against a trespasser: *Grover v. Hawley*, 5 Cal. 485. The right to the use of growing timber on mineral lands, as between miners and agriculturists, is to be governed by the rule of priority of appropriation: *Rogers v. Soggs*, 22 Cal. 444.

39. Public Lands, Occupants of.—As between occupants of public lands, neither party can claim the right to the growing timber thereon. The act of congress of March 2, 1831, prohibits the cutting or destruction of timber on the public lands: *Rogers v. Soggs*, 22 Cal. 44. The statute making possessory rights of settlers on public lands for agricultural purposes yield to the rights of miners has legalized what would otherwise be a trespass, and the act cannot be extended by implication to cases not especially provided for: *Wemiar v. Lowery*, 11 Cal. 104. One who claims public lands in California for raising fruit trees or crops, cannot enjoin miners from digging up the same for mining purposes, unless he can show priority of right before the land was located for mining purposes: *Ensmonger v. McIntire*, 23 Cal. 593.

40. Who may Maintain the Action.—The plaintiff out of possession cannot sue for the property severed from the freehold when the defendant is in possession of the premises from which the property was severed, if he holds them adversely, in good faith, under claim and color of title: *Halleck v. Mixer*, 16 Cal. 574; See *Nevada Co. and Sac. Canal Co. v. Kidd*, 37 Cal. 282; see *Maine Boys Tunnel Co. v. Boston Tunnel Co.*, 37 Cal. 40; *Raffeto v. Fiori*, 50 Id. 363.

41. Trespass quare clausum fregit.—In trespass *quare clausum fregit* it is incumbent on the plaintiff to show that he was in the actual possession of the premises at the time of the alleged trespass, and the defendant may prove under a general denial that a tenant of the plaintiff was in the actual possession: *Uttendorffer v. Saegers*, 50 Cal. 496.

*No. 425.**The Same—For Treading Down Grain.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant entered upon the plaintiff's lot [or farm], known as, and trod down the grain then growing thereon, and cut down certain trees [or as the case may be], contrary to the statute, etc., to the damage of the plaintiff dollars.

[Demand of Judgment.]

42. Gist of the Action.—The allegations that the defendant unlawfully and willfully permitted said sheep to be herded, and did herd the same upon the lands of which the plaintiff was then and still is the owner, and in a subsequent paragraph, that defendant herded and permitted said sheep to be herded in and upon the above described barley field, constitute the gist of the action: *Logan v. Gedney*, 38 Cal. 579; see *Waters v. Moss*, 12 Id. 535; *Comerford v. Dupuy*, 17 Id. 308; *Richmond v. Sac. Val. R. R. Co.*, 18 Id. 355; and see Hittell's Codes and Statutes of Cal., par. 15,826 *et seq.*

43. Herding Sheep.—The rule of the common law of England that every man was bound to keep his beasts within his own close, under the penalty of answering in damages for all injuries resulting from their ranging at large never was the law of California, the Statutes of 1850, 131–219, being directly in conflict with and repugnant to that rule; so of the other subsequent acts on the same subject: See *Waters v. Moss*, 12 Cal. 535; *Comerford v. Dupuy*, 17 Id. 308; *Richmond v. Sac. Val. R. R. Co.*, 18 Id. 355; *Logan v. Gedney*, 38 Id. 579.

44. Lawful Fences.—A party cannot recover for injuries done by cattle breaking into plaintiff's close, unless the land entered be inclosed by a fence of the character described by statute, or at least by an inclosure equivalent, in its capacity to exclude cattle, to the statutory fence: *Comerford v. Dupuy*, 17 Cal. 308.

*No. 426.**For Removal of Fence.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at the defendant forcibly broke and entered upon the plaintiff's land, and took down a fence standing upon said land and removed the same, and also then and there erected another fence on said land, and also then and there disturbed the plaintiff in the use and occupation of said land, and prevented him from enjoying the same as he otherwise would have done, to the damage of the plaintiff dollars.

[Demand of Judgment.]

*No. 427.**For Trespass on Chattels.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant unlawfully took from the possession of the plaintiff, and carried away [describe the goods], the property of the plaintiff, and still unlawfully detains the same from the plaintiff [or where the possession to the property was regained, and unlawfully detained the same from the plaintiff for the space of days], to the damage of the plaintiff dollars.

[Demand of Judgment.]

45. Averment of Special Damage.—That by reason of such unlawful taking and detention of said property, the plaintiff was compelled to pay, and did, on the day of, 187., at, pay dollars to procure the return of the same, and also dollars for storage, and sustained other injury.

46. The Lessor of Personal Property, such as sheep, cannot maintain trespass or trover for an injury done to the property by a stranger during the term of the lease and while the lessee is in the actual possession of the property: *Triscony v. Orr*, 49 Cal. 612.

*No. 428.**For Malicious Injury to Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant willfully and maliciously intending to injure the plaintiff, cut, broke and mutilated certain [designate what], the property of the plaintiff, of the value of dollars, and greatly injured them, so that the plaintiff was compelled to expend dollars in repairing the same, to his damage dollars.

[Demand of Judgment.]

*No. 429.**For Entering and Injuring a House and Goods Therein.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, A. B., entered into the plaintiff's house,

No., street, in the city of, in this State, and unlawfully broke and injured the doors and walls thereof [or other injury to house], and took and carried away [enumerate articles], the property of the plaintiff, and converted and disposed of the same to his own use, to plaintiff's damage dollars.

[*Demand of Judgment.*]

47. Abusive Language.—For the allegations in a complaint against a person who stops in front of plaintiff's house and uses abusive language towards him, see *Adams v. Rivers*, 11 Barb. 390.

48. Action Transitory and Local.—Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action: *McKenna v. Fisk*, 1 How. U. S. 241. Actions of trespass, except those for injury to real property, are transient in their character: *Howe v. Wilson*, 1 Den. 181; *Cage v. Jeffries*, Hempst. 409.

49. Joinder of Parties.—It is unnecessary to join as defendants in an action for damages for trespass, all persons who unite in committing it; all or any may be sued: *Mandlebaum v. Russell*, 4 Nev. 551.

50. Officer without Process.—An officer without process who puts a person in possession as receiver commits a trespass: *Rowe v. Bradley*, 12 Cal. 226.

51. Trespass to the Person.—Where a person with a crowd of others entered the premises of plaintiff, knowing that admission had only been obtained by an action of violence by another person in the crowd: *Held*, that he was liable as a trespasser: *Chandler v. Egan*, 28 How. Pr. 98.

COMPLAINTS—SUBDIVISION SIXTH.

For the Conversion and for the Possession of Specific Property.

CHAPTER I.

PERSONAL PROPERTY.

No. 430.

For Conversion—Common Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187.., the plaintiff was lawfully possessed of [briefly describe the goods] his property, of the value of.....dollars.

II. That on said day, at....., the defendant unlawfully took and carried away said goods and converted and disposed of the same to his own use, to the damage of the plaintiffdollars.

[Demand of Judgment.]

No. 431.

ii. *The Same—Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of , 187., he was the owner of [describe the property], of the value of dollars, and was then entitled to the immediate possession of the same.

II. That on said....day of.....187 , at....., the defendant then being in the possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the plaintiffdollars.

[Demand of Judgment.]

NOTE.—If the plaintiff desires to recover for time spent and money expended in endeavoring to find and obtain possession of the property, under sec. 3336 of the civil code, he should specially allege the facts. In such case, add to the preceding forms the following: III. That the plaintiff properly spent days' time, and expended dollars in pursuit of said property, and that the time so spent was reasonably worth dollars.

1. Conversion Defined.—The rule is that any unlawful interference with the property of another, or exercise of dominion over it by which the owner is damaged, is sufficient to maintain the action: 10 Wend. 349; *Latimer v. Wheeler*, 1 Keyes, 468. Every unauthorized assumption of dominion over property in hostility to the right of the true owners is a conversion: *Boyce v. Brockway*, 31 N. Y. 490. The principle applied to the case of an infant obtaining goods by fraudulent representations as to his age: *Eckstein v. Frank*, 1 Daly, 334; or to a case of vendor retaking goods after delivery; *Huelet v. Reyns*, 1 Abb. Pr. (N. S.) 27; or of a factor disobeying instructions of his principal: *Scott v. Rogers*, 31 N. Y. 679; or of a pledgee of stock or goods selling without due notice to pledgor: *Jaroslauski v. Sanderson*, 1 Daly, 232; *Brass v. Worth*, 40 Barb. 648; *Campbell v. Parker*, 9 Bosw. 322; *Genet v. Howland*, 45 Barb. 560; 30 How. Pr. 360; *Clarke v. Meigs*, 10 Bosw. 337; or of subsequent sale of shares purchased under suspicious circumstances: *Anderson v. Nicholas*, 28 N. Y. 600; or of note deposited by one bank in another for collection, and diverted to payment of antecedent debt: *Potter v. Merchants' Bank*, 28 N. Y. 641; or of money intended for payment of notes, and seized by the holder without giving them up: *McNaughton v. Cameron*, 44 Barb. 406; or of property wrongfully intermixed: *Morgan v. Gregg*, 46 Barb. 183; or of property seized under void process; *Kerr v. Mount*, 28 N. Y. 659; *Hicks v. Cleveland*, 39 Barb. 573; or of property to be returned if not paid for by a certain time: *Person v. Civer*, 29 How. Pr. 432; or of property obtained by fraudulent representations: *Cary v. Hotaling*, 1 Hill 311; *Olmsted v. Hotaling*, Id. 317; questioned in *Roberts v. Randel*, 3 Sandf. 707; or of property obtained in exchange for a void note: *Loeschigh v. Blun*, 1 Daly, 49.

2. Conversion, what Constitutes.—A sale of property by insured after an abandonment is a conversion: *Robinson v. United Ins. Co.*, 1 Johns. 592. So, a sale of property by a manufacturer after delivery to the plaintiff is a conversion: *Babcock v. Gill*, 10 Johns. 287. The mere sale by one tenant in common of the entire chattel, followed by exclusive claim and dominion in the purchaser: 2 Kent's Com. 350; 5 Barn. & A. 395; 21 Wend. 72; *Wilson v. Reed*, 3 Johns. 175; *Hyde v. Stone*, 9 Cow. 230; *Mumford v. McKay*, 8 Wend. 442. Where a commission merchant places goods consigned to him for sale in the hands of another for sale, it is a conversion: *Moffat v. Wood*, Seld. notes Nos. 5, 14; commented on in *Roth v. Palmer*, 27 Barb. 652. Or if a factor pledge the goods of his principal for his own debt: *Kennedy v. Strong*, 14 Johns. 128; see *Henry v. Marvin*, 3 E. D. Smith, 71.

3. Conversion by Agent.—The omission or refusal to pay over moneys received by a factor, agent or trustee, in the course of his agency or trust, will not lay the foundation of an action of trover: Paley on Ag. 79; 1 Ves. Jr. 424; 16 N. Y. 250; *Harris v. Schultz*, 40 Barb. 315. So, a misuse of the property pledged by attempting to sell it before time of forfeiture, is a conversion: *Vincent v. Conklin*, 1 E. D. Smith, 203. An auctioneer, who in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of the sale to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion: *Rogers v. Huie*, 2 Cal. 571. A mere agreement between two or more persons to convert the property of another without an actual intermeddling with it, does not give the owner a cause of action against the parties to the agreement: *Herron v. Hughes*, 25 Cal. 555.

4. Conversion, Allegation Sufficient.—An allegation in the complaint that defendant converted the property to his own use, is sufficient. It is not necessary to state the mode in which the defendant appropriated the property: *Decker v. Mathews*, 12 N. Y. 321, 324. A declaration in trover for a "tool chest containing divers tools and working utensils," and "trunk containing clothes," held sufficiently certain: *Ball v. Patterson*, 1 Cranch C. Ct. 607. A narration reciting all the circumstances attending the seizure and conversion of a bag of gold is immaterial and redundant: *Green v. Palmer*, 15 Cal. 411. It is not necessary to set out the manner in which the defendant converted the property: *Otero v. Bullard*, 3 Cal. 189; *Decker v. Mathews*, 12 N. Y. 321, 324. An allegation in the complaint of the place where the property was taken, in an action to recover possession of personal property, is surplusage: *Lay v. Neville*, 25 Cal. 545. That the defendant took and carried away the goods, is equivalent to an averment that he converted the property to his own use: *Hutchings v. Castle*, 48 Cal. 152.

5. Demand.—It is a general rule, that when the possession of property is originally acquired by a tort, no demand previous to the institution of the suit is necessary: *Ledley v. Hays*, 1 Cal. 160; *Paige v. O'Neal*, 12 Cal. 483; *Sargent v. Sturm*, 23 Cal. 359; *Ham v. Henderson*, 50 Cal. 367; *Pierce v. Van Dyke*, 6 Hill, 613; *Pringle v. Phillips*, 5 Sandf. 157. In an action against the sheriff, for property tortiously taken by him under an attachment or execution against some other person, it is not necessary to allege and prove a demand for its delivery prior to the commencement of the action: *Ledley v. Hays*, 1 Cal. 160. And all cases since then to the contrary have been overruled in *Boulware v. Craddock*, 30 Cal. 190; see, also, *Sargent v. Sturm*, 23 Cal. 359; as the only purpose of proving a demand in trover and replevin is to show defendant's possession wrongful: *Whitman G. and S. M. Co. v. Tritle*, 4 Nev. 494. Thus, if a sheriff, by virtue of an execution, seizes the property of a person, other than the judgment-debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit: *Boulware v. Craddock*, 30 Cal. 190; *Moore v. Murdock*, 26 Cal. 524; see, also, *Woodworth v. Knowlton*, 22 Id. 164.

6. Demand and Refusal.—A demand and refusal are never necessary as evidence of conversion, unless the other acts of the defendant are not sufficient to prove it. Nor are they evidence when it was not in the defendant's power to deliver the property when demanded: *Gilmore v. Newton*, 9 Allen, 171. The demand and refusal are only evidence of the conversion: *State v. Patten*, 49 Me. 383; *Hunt v. Holton*, 13 Pick. 216; *Pierce v. Benjamin*, 14 Pick. 356; *Thurston v. Blanchard*, 22 Pick. 18; see 1 Id. 397. To constitute a demand and refusal an evidence of a conversion, it is sufficient that the goods are in the possession of the agent of the defendant, and the latter on demand refuses to permit his agent to deliver them: *Chambers v. Lewis*, 28 N. Y. 454; 16 Abb. Pr. 433. A refusal to deliver, retracted before suit brought, ceases to be a conversion: *Wells v. Kelsey*, 15 Abb. Pr. 53.

7. Demand, when Necessary.—Where goods were wrongfully taken by one person, and came rightfully into the possession of another, a demand upon the latter should be averred: *Pierce v. Van Dyke*, 6 Hill, 613; *Ely v. Ehle*, 3 N. Y. 506; *Tallman v. Turck*, 26 Barb. 167. So in case of a bailee in good faith, and where the goods are subsequently wrongfully detained:

Purves v. Moltz, 5 Rob. 653. As to cases in which previous demand of goods from holder will be essential to render him liable for their conversion: See *Chambers v. Lewis*, 16 Abb. Pr. 433; S. C., 28 N. Y. 454; *Hicks v. Cleveland*, 39 Barb. 573. When a demand is necessary, it is sufficient to make it upon the one who is in the actual possession, and able to comply with it: *Woodworth v. Knowlton*, 22 Cal. 164.

8. Election of Remedy.—Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in *assumpsit* for the value of the property: *Fratt v. Clark*, 12 Cal. 89. The election between the right to sue in tort or in contract in respect to the same transaction, is conclusive, and when made must be abided by on trial, and in its after consequences: *Bank of Beloit v. Beale*, 34 N. Y. 473; *Ransom v. Wetmore*, 39 Barb. 104; *Wright v. Ritterman*, 1 Abb. Pr. (N. S.) 428; *People v. Kelly*, Id. 432; *Grocers' Nat. Bk. v. Clark*, 31 How. Pr. 115. And the complaint must be framed with precise reference to the specific remedy invoked: *Smith v. Knapp*, 30 N. Y. 581. An allegation of contract by way of inducement will not vary the nature of an action sounding in tort: *Person v. Civer*, 28 How. Pr. 139. As to the effect of an election to waive tort and sue in *assumpsit*, see *Mayor of N. Y. v. Parker Vein S. S. Co.*, 8 Bosw. 300. And if no demand is necessary in an action to recover certain specific personal property, no demand is necessary in an action brought to recover its value only: *Whitman G. and S. M. Co. v. Tritle*, 4 Nev. 494.

9. Gist of the Action.—The conversion is the gist of the action, and without conversion neither possession of property, negligence, nor misfortune, will enable the action to be maintained: *Rogers v. Huie*, 2 Cal. 571. Defendant must have converted the property to his own use, and if not, then any other act to amount to a conversion must be done with a wrongful intent, either expressed or implied: Id.

10. Intent.—A wrongful intent is not an essential element of the conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it: 1 Wils. 328; 23 Wend. 462; 9 Barb. 242; *Boyce v. Brockway*, 31 N. Y. 490.

11. Joinder of Parties.—All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement: *Whitney v. Stark*, 8 Cal. 514. In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are joint trespassers: *Lewis v. Johns*, 34 Cal. 629. In case of joint bailees, demand and refusal by one is not of itself, as in case of partners, a conversion: *Mitchell v. Williams*, 4 Hill, 13. But the refusal by a partner is a conversion: *Holbrook v. Wright*, 24 Wend. 169.

12. Joint Ownership.—A complaint which avers that the defendant took and carried away "certain goods, chattels and effects, of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs: *Pelberg v. Gorham*, 23 Cal. 349.

13. Jurisdiction.—Actions to recover compensation for injuries done to personal property may be maintained wherever jurisdiction of the parties can be obtained: 26 How. Pr. 257; 1 Chitt. Pl. 243; Com. Dig. Trover, 7; 9 Johns. 67, 69; 2 Hill, 262; *Smith v. Butler*, 1 Daly, 508.

14. Liability for Conversion.—A wrongful taker of goods is liable for their whole value, although the owner had insured them and has been paid in full: *Perrott v. Shearer*, 17 Mich. 48.

15. Measure of Recovery.—In an action by the pledgee of goods against a stranger for the conversion of pledged property, the rule is that plaintiff is entitled to recover its full value; but if against the owner, or one acting in privity with him, then only for plaintiff's special interest therein as pledgee: *Treadwell v. Davis*, 34 Cal. 601. So, also, as against sheriff for conversion of goods pledged, he will be held liable only for plaintiff's special interest in the goods: *Id.* In Nevada, if personal property is unlawfully seized and converted, the measure of damages is the value of the property at the time of the conversion, and interest from that time to judgment: *Carlyon v. Lannan*, 4 Nev. 156. In California the damage caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, 2. A fair compensation for the time and money properly expended in pursuit of the property: Civil Code, sec. 3336, as amended January 22, 1878. One having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses: *Id.* 3338.

16. Offer to Restore.—And if, before suit is brought, the defendant unconditionally offers to restore the property, the object is attained, and the suit is wholly unnecessary: *Savage v. Perkins*, 11 How. Pr. 17.

17. Ownership.—Ownership by the plaintiff must be shown, or a special property with the immediate right of possession: *Clark v. Skinner*, 20 Johns. 465; *McCurdy v. Brown*, 1 Duer, 101; *Dodworth v. Jones*, 4 Id. 201. If the plaintiff claims as owner, an allegation that he is owner is sufficient, without stating other facts to show his title: *Depew v. Leal*, 2 Abb. Pr. 131; *Burns v. Robbins*, 1 Code R. 92; *Roberts v. Willard*, *Id.* 100; *Heine v. Anderson*, 2 Duer, 318. But an equitable title without an immediate right to possession is not sufficient to form ground for this action: *Whitcomb v. Hungerford*, 42 Barb. 177. It is unnecessary to allege ownership of the goods when the complaint alleges a forcible and wrongful taking: *Kissam v. Roberts*, 6 Bosw. 154, and cases there cited; *Bliss v. Cottle*, 32 Barb. 322; *Heine v. Anderson*, 2 Duer, 318. Or a vested legal interest: *Pope v. Tucker*, 23 Geo. 484; see *Hunt v. Pratt*, 7 R. I. 286. Though either allegation of ownership or possession is sufficient: *Kuhland v. Sedgwick*, 17 Cal. 123. But an averment that plaintiff is entitled to the possession is insufficient: *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304; *Pattison v. Adams*, Hill & D. Sup. 426. Or that the goods were his property, by order of several attachments duly issued, etc.: *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217. Although the defendant, before suit, has parted with the possession of the property, the action may be sustained: *Brockway v. Burnap*, 16 Barb. 309; reversing S. C., 12 Id. 347; *Savage v. Perkins*, 11 How. Pr. 17; *Drake v. Wakefield*, 11 Id. 106; *Ward v. Woodburn*, 27 Barb. 346; *Van Neste v. Conover*, 20 Id. 547; *Nichols v. Michael*, 23 N. Y. 264.

18. Parties Plaintiff—Bailee.—A bailee may sue for conversion: *Green v. Clarke*, 2 Kern. 343; *Alt v. Weidenberg*, 6 Bosw. 176; so, also, an administrator: *Ham v. Henderson*, 50 Cal. 367.

19. Consignee.—A consignee is in law presumed to be the owner: *Fitzhugh v. Wiman*, 9 N. Y. 559. So of a factor: *Gorum v. Carey*, 1 Abb. Pr. 285.

20. Factor.—So may a factor in charge of goods, and responsible for their value: *Gorum v. Carey*, 1 Abb. Pr. 285.

21. Finder.—The finder of goods may maintain an action against a wrongdoer who subsequently converts them: *Mathews v. Harsell*, 1 E. D. Smith, 393.

22. Husband.—A husband in joint possession with his wife of chattels purchased by her, may maintain trover against her mortgagee, on the ground that her contracts were void, and he alone was liable for the price: *Switzer v. Valentine*, 10 How. Pr. 109.

23. Mortgagor.—The action of trover depends on legal title, general or special, to support it, and the mortgagor, as against the mortgagee, has no title: *Heyland v. Badger*, 35 Cal. 404.

24. Partner.—A partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership: *Buckley v. Carlisle*, 2 Cal. 420.

25. Receiver.—A receiver of partnership effects cannot maintain an action against a person who had converted the assets of the firm before his appointment; he must sue in the name of the firm in whom was the legal right of action: *Yeager v. Wallace*, 44 Penn. State R. 294; but see Cal. Code C. P., sec. 568.

26. Sheriff.—A sheriff may hold a party liable for conversion who wrongfully removes goods levied upon: *Barker v. Binninger*, 4 Kern, 270. But such action is only maintainable by him, and not by his deputy: *Terwilliger v. Wheeler*, 35 Barb. 620.

27. Specific Property.—Ordinarily, the owner is entitled to recover his specific property, or its value, and cannot be compelled to accept other property of the same kind and equal value in lieu of that which was converted: *Atkins v. Gamble*, 42 Cal. 86. But shares of stock in a corporation stand upon a different footing, because they are mere evidences of interest in the business of the corporation, and if all the shares are of equal value, there can be no reason for preferring one share to another: *Id.*

28. Tenants in Common.—One tenant in common of chattels cannot sue another for the appropriation of his share, when capable of severance: *Forbes v. Shattuck*, 22 Barb. 568; *Tripp v. Riley*, 15 Id. 333; *Tinney v. Stebbins*, 28 Id. 290. But otherwise when the conversion is in fact a destruction of the property: *Benedict v. Howard*, 31 Barb. 569. If the parties were tenants in common, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and an action for goods, wares and merchandise sold and delivered will not entitle him to a judgment: *Williams v. Chadbourne*, 6 Cal. 559.

29. Parties Defendant—Agent.—Where the action is brought against an agent, it is necessary to allege, not only that defendant received the money as agent, but that he converted it in the course of his employment as such: *Porter v. Hermann*, 8 Cal. 619; see, also, *Sharp v. Whipple*, 1 Bosw. 557. Trover will not lie against an agent, where the agent, though wanting in good faith, has acted within the scope of his powers: 4 T. R. 260; 10 Johns. 172; Peak's Cas. 49; 4 Esp. 156; 4 Wend. 613; 2 Bos. & P. 438; 1 Vent. 223; 4 Camp. 183; *McMorris v. Simpson*, 21 Wend. 610. A mere omission of duty is not enough. Where goods are detained by an agent by direction and command of his principal, trover lies against the principal: *Shotwell v. Few*, 7 Johns. 302; so, the principal is liable where he receives the benefit of the act of the agent: 1 Hill, 318; 7 Bing. 543; *Cobb v. Dows*, 10 N. Y. 335.

30. Attorney.—As to the attorney's liability, see *Ford v. Williams*, 13 N. Y. (3 Kern.) 577.

31. Carrier.—In a count in trover against a carrier, it is unnecessary to allege his duty as such, if his business is set forth, together with his negligence, and the loss resulting therefrom: *Wright v. McKee*, 37 Vt. 161.

32. Factor.—Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property: *Scriber v. Masten*, 11 Cal. 303.

33. Infant.—An infant may be made liable in trover, although the goods converted be in his possession by virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offenses for which infancy cannot afford protection: *Vasse v. Smith*, 6 Cranch, 226.

34. Pledgee.—Where, without calling on the pledgor to redeem, the pledgee sold the pledge, the same being a chose in action, this was a conversion of the pledge, and the pledgee thereby became liable, in an action for the conversion, for the value of the pledge at the time of the conversion in excess of the demand secured by the pledge, with legal interest thereon from the time of the conversion: *Gay v. Moss*, 34 Cal. 125; see, also, Civil Code, secs. 3336 and 3338.

35. Principal and Agent.—The principal is liable for a conversion of goods by his agent: *Chambers v. Lewis*, 28 N. Y. 454. But mere possession by an innocent agent does not of itself constitute a conversion: *Hunt v. Kane*, 40 Barb. 638. The agent actually disposing of the goods of another is liable to the real owner, though ignorant of the fraud conducted by his principal: *Dudley v. Hawley*, 40 Barb. 397.

36. Trespasser.—An action of trover may be maintained against a trespasser who is cutting timber, as soon as the timber is cut: *Sampson v. Hammond*, 4 Cal. 184.

37. Warehouseman.—Where warehousemen deliver wheat to third persons who bought from the broker for their own debt, on the ground that they held the storage receipt of defendants to one S., who had loaned money to E. & H. on the wheat as collateral, and had indorsed the receipt: "Deliver to bearer or E. & H.," the defendants knowing at the time of the delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a conversion: *Hanna v. Flint*, 14 Cal. 73.

38. Possession and Right of Possession.—The action cannot be maintained without a property in the plaintiff, either general or special: *Hotchkiss v. McVickar*, 12 John. 403; *Barton v. Dunning*, 6 Blackf. 209; *Grady v. Newby*, Id. 442. The plaintiff must either have the possession or the immediate right to the possession of the property, to entitle him to recover: *Middlesworth v. Sedgwick*, 10 Cal. 392; *Redman v. Gould*, 7 Blackf. 361; *Danley v. Rector*, 5 Eng. 211; *Kemp v. Thompson*, 17 Ala. 9; *Purdy v. McCullough*, 3 Barr, 466; *Stephenson v. Little*, 10 Mich. 433. The right to possession must be present and immediate: 2 Greenl. on Ev. 552, sec. 561; *Decker v. Mathews*, 12 N. Y. 313, and see 321; *Redman v. Hendricks*, 1 Sandf. 32; *Wheeler v. Train*, 3 Pick. 255; *Sharp v. Whittenhall*, 3 Hill, 576. Any right to actual possession at the time of taking is sufficient to form ground of action: *Frost v. Mott*, 34 N. Y. 253; *Bowen v. Fenner*, 40 Barb. 383. The action does not lie in favor of a lessor of chattels during the lessee's right of possession: *Triscony v. Orr*, 49 Cal. 612. Possession under a general or even a gratuitous bailment is sufficient evidence of title to entitle the bailee to maintain an action of trover against a stranger who intermeddles with the property: 2 Taunt. 268; Saund. Pl. & Ev. 1151; *Bowen v. Fenner*, 40 Barb. 383. Where M. made a bill of sale of goods then in the possession of G. as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant to recover the same: *Held*, that M. had no title to the property which he could recover in such an action, as the mere handing back the bill of sale of M. did not re-vest the title in him: *Middlesworth v. Sedgwick*, 10 Cal. 392.

39. Possession Averred.—An averment in the complaint that plaintiff was in possession, imports that his possession was lawful: *Sheldon v. Hoy*, 11 How. Pr. 11.

40. Possession by Defendant.—In an action to recover the possession of personal property, it is not necessary to show that defendant had possession in fact of the goods at the time the action was brought. If the defendant had been previously in possession, and was present at the time of a demand upon another person and refusal by him at the place where the goods were, he cannot set up a defense of the action that he had parted with the possession to such person: 5 Carr & P. 346.

41. Property and Possession.—It has sometimes been held that trover is founded exclusively on the right of property: *Hostler v. Skull*, 1 Tayl. 152. The right of property and the right of possession must concur, or the action will not lie. The special property must arise from possession: *Hotchkiss v. McVickar*, 12 Johns. 403; *McCurdy v. Brown*, 1 Duer, 101.

42. Purchase from Agents.—If one is intrusted with goods by the owner, with power to sell the same at retail for the owner, as his agent or clerk, and if he then sells the goods in payment of his private debt to one who has full knowledge of the owner's title and the agent's relation to the goods, the purchase made with this knowledge amounts to a conversion: *Herron v. Hughes*, 25 Cal. 555.

43. Value.—An averment of the value of the property is not material: Bac. Abr., tit. Tresp., I. 2; and Trov., F. 1; *Connoss v. Meir*, 2 E. D. Smith,

314. The value of the goods is not of the substance of the issue, and need not be alleged: *Richardson v. Hall*, 21 Md. 399. Nor is time a material allegation: *Id.* The wrongful doing of the act is sufficient, without specifying the mode or manner in which it was done: *Id.* In designating the goods, a description which will identify them is sufficient: *Root v. Woodruff*, 6 Hill 418.

44. **Who Liable.**—It is a matter of no consequence that some other party took the property first, or that defendants purchased from a party who had no authority to sell; it is still a conversion. Somebody else may be also liable, but this does not relieve the defendants from their liability: *Briggs v. Waugenheim*, Cal. Sup. Ct., Oct. T., 1869.

45. **Wrongful and Unlawful.**—It is not necessary to designate the act as “wrongful” or “unlawful” where the facts show an illegal taking of the goods: *Buck v. Colbath*, 7 Minn. 310; *Adams v. Corrison*, *Id.* 456; see vol. i, p. 119, note 58.

46. **Schedule Annexed.**—Where the articles are numerous, they may conveniently be enumerated in a schedule or exhibit annexed to the complaint, and referred to as such. It is not necessary to state their value severally: *Root v. Woodruff*, 6 Hill, 418.

No. 432.

iii. *By Seller against Fraudulent Buyer of Goods, for Conversion.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ... day of 187., at, the defendant represented to the plaintiff that one A. B. was solvent and in good credit, and worth dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell to the said A. B. [dry goods] of the value of dollars.

III. That the said representations were false, and known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff.

IV. That the defendant, having so obtained from the plaintiff the possession of said goods, converted and disposed of them to his own use, to the damage of the plaintiff dollars.

[Demand of Judgment.]

47. **Allegations against Fraudulent Buyer and his Transferee.** That the said [buyer] afterwards transferred said goods to the defendant A. B., who wrongfully detains them from the plaintiff. That on the ... day of. 187., at the plaintiff demanded of said A. B. that he deliver the same to him, but the said A. B. refused to do so, to his damage dollars.

48. Fraud of Purchaser. The plaintiff may declare generally, claiming the property as his, and charging that the defendants have become possessed of and wrongfully detain the same, and give the special facts in evidence on the trial to establish the fraud: *Bliss v. Cottle*, 32 Barb. 322; *Hunter v. Hudson River Iron and Machine Co.*, 20 Barb. 493.

No. 433.

iv. *For Goods Wrongfully taken from Possession of Plaintiff's Assignor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, one A. B. owned and was lawfully possessed of [describe the property], of the value of dollars.

II. That on the day of, 187., the defendant wrongfully took said goods from the possession of said A. B., and ever since has detained the same.

III. That on the day of, 187., said A. B. assigned and set over to the plaintiff said goods, and also his claim to damages for said taking and detention.

IV. By reason of the premises, the plaintiff has sustained damage in the sum of dollars.

[Demand of Judgment.]

No. 434.

v. *For Goods Wrongfully taken from Possession of Bailee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the plaintiff was, and still is the owner of [describe the goods], which goods were then in the possession of A. B., with whom the plaintiff had left the same for safe keeping [or otherwise].

II. That on the day of, 187., the defendant wrongfully took said goods from the possession of said A. B., and still detains the same from the plaintiff without his consent, to the damage of the plaintiff dollars.

III. That before this action, to wit, on the day of, 187., the time which the said A. B. was safely to keep said goods had expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession of said goods.

[Demand of Judgment.]

49. Bailee Holding Lien.—The right of possession of a bailee holding a lien does not preclude the owner from maintaining this action against a third person wrongfully taking the goods from the bailee. Either the owner or bailee may bring the action: see *Fitzhugh v. Wyman*, 9 N. Y. 559; *Neff v. Thompson*, 8 Barb. 213.

No. 435.

vi. *For Conversion of a Promissory Note.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff made his promissory note, of which the following is a copy; [insert copy] which note was made and delivered by the plaintiff to A. B., without consideration, and for his accommodation, and with the special purpose and agreement between the plaintiff and said A. B., that [state intended appropriation of the note as the fact was].

II. That said note was thereafter offered by said A. B. to the Bank of, which refused to discount the same, and returned it to the said A. B., whereupon the plaintiff became entitled to the possession thereof [or state facts as they occurred].

III. That thereafter, but before the maturity of the note, the defendant, C. D., without the knowledge or consent of the plaintiff or of A. B., unlawfully took the said note from the possession of A. B., and delivered it to the defendant E. F.; and that the defendants thereupon converted and disposed of it to their own use, whereby the plaintiff was compelled to pay it, to his damage dollars.

[Demand of Judgment.]

50. Bank Notes.—As to the manner in which bank notes may be described in complaint, see *Dows v. Bignall*, Hill & D. Supp. 407.

51. Value of Note.—If the plaintiff does not know the exact amount of the note converted, he may state it as “of great value, to wit, the value of,” etc., designating a sum: *Bissel v. Drake*, 19 Johns. 66. The amount of the note is *prima facie* the measure of damages: *Ingalls v. Lord*, 1 Cow. 240; *Decker v. Mathews*, 5 Sandf. 439.

No. 436.

vii. *By Assignee after Conversion.*

[TITLE.]

The plaintiff complains, and alleges:

I. That before, and until the time hereinafter mentioned, one A. B. owned and was lawfully possessed of [designate

the goods], or was entitled to the immediate possession of [describe the goods].

II. That on the day of, 187., the defendant converted the same to his own use.

III. That on the day of, 187., said A. B. assigned to the plaintiff his claim against the defendant for damages for said conversion.

[Demand of Judgment.]

52. Assignment by Married Women.—An assignment by married women of certain specified goods and chattels, “as well as all claims and demands for any portion of them,” carries the right of action for the previous wrongful taking of any of the assigned goods: *Sherman v. Elder*, 24 N. Y. 381.

53. Assignment for Benefit of Creditors.—A general assignment of all property for the benefit of creditors was held to pass a right of action for the conversion of promissory notes: *Whittaker v. Merrill*, 30 Barb. 389; and see *Westcott v. Keeler*, 4 Bosw. 564.

54. Consideration of Assignment.—It is not necessary to allege the consideration of the assignment: *Vogel v. Badcock*, 1 Abb. Pr. 176. A general averment of ownership is sufficient in an action by an assignee before the conversion. It is not necessary to set forth his title in the complaint. Under such an averment, a bill of sale from the former owner may be given in evidence: *Heine v. Anderson*, 2 Duer, 318.

55. Conversion before Assignment.—Where the complaint charges a conversion of personal property after its assignment to the plaintiff, he cannot recover for a conversion before its assignment. The case is not a variance, but the causes of action are distinct: *Whittaker v. Merrill*, 30 Barb. 389.

56. Complaint by Assignees.—The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants, and the moneys which might be made by the same; and that, after this assignment, plaintiff demanded the warrants from defendant, who refused to deliver them: *Held*, that this complaint stated a sufficient cause of action; that as assignee of Johnson, plaintiff was entitled to recover the warrants or their value, with damages for their detention accruing after the assignment: *Lazard v. Wheeler*, 22 Cal. 139.

57. Demand by Assignee.—Such a claim will pass by a general assignment in trust for the payment of creditors. And a new demand by the assignee is unnecessary: *McKee v. Judd*, 12 N. Y. 622.

58. Power of Owner after Conversion.—After the conversion of a chattel or an injury to real or personal property, the owner may either sell the chattel itself or assign his right of action for the conversion or injury: *Hall v. Robinson*, 2 Comst. 293; *Cass v. New Haven R. R. Co.*, 1 E. D. Smith, 522; *Robinson v. Weeks*, 1 Code Rep. 311; *McGinn v. Worden*, 3 E. D. Smith, 355; *Wilson v. Cook*, Id. 252; *Howell v. Kroose*, 4 Id. 357; 2 Abb. Pr. 167; *North v. Turner*, 9 Serg. & R. 244; *Hoyt v. Thompson*, 1 Seld. 347;

McKee v. Judd, 2 Kernan, 622; see *Hicks v. Cleveland*, 39 Barb. 573; *Waldron v. Willard*, 17 N. Y. 466.

59. Right of Action Assignable.—A right of action of this nature is assignable, and the assignee may sue in his own name: *Gradwohl v. Harris*, 29 Cal. 150; Cal. Code C. P., sec. 367.

No. 437.

viii. *Against One in Possession Innocently.*

[TITLE]

The plaintiff complains, and alleges:

I. [Allege ownership.]

II. That on the day of, 187., at, one A. B. wrongfully took said goods and chattels from the possession of the plaintiff, and unjustly detained the same.

III. That thereafter the same came into the possession of the defendant, who refused to deliver them to the plaintiff, although, before this action, to wit, on the day of, 187., the plaintiff duly demanded of the defendant possession of the same.

IV. That the defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage dollars.

[Demand of Judgment.]

60. Assignee.—Where the defendant is assignee for the benefit of creditors from wrong-doers, it is necessary to allege that defendant has refused to deliver it up upon demand: *Fuller v. Lewis*, 3 Abb. Pr. 383; see also *Gurney v. Kenny*, 2 E. D. Smith, 132. But if an actual wrongful conversion of the property is proved, proof of a demand is unnecessary: *Davison v. Donadi*, 2 E. D. Smith, 121; *Pringle v. Phillips*, 5 Sandf. 157.

No. 438.

ix. *By Administrator, after Conversion.*

[TITLE]

The plaintiff complains, and alleges:

I. That before and until the time hereinafter mentioned, one A. B. was lawfully possessed of [or was entitled to the immediate possession of—describe goods], the property of the said A. B., of the value of dollars.

II. That on the day of, 187., the same came into the possession of the defendant, who from that day until the commencement of this action has detained the same.

III. That before the commencement of this action, to wit, on the day of, 187., the said A. B. [or the plaintiff] demanded the same from the defendant, but he refused to deliver them.

IV. That thereafter and before this action, said A. B. died intestate, and on the day of, 187., letters of administration upon the estate of said A. B., deceased, were duly issued and granted to the plaintiff by the Probate Court of the County of, of this State, appointing the plaintiff administrator of all the goods, chattels, and credits which were of said deceased, and that the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office, and is now such administrator.

[*Demand of Judgment.*]

61. Action Lies.—The administrator may maintain an action for wrongful conversion of the personal estate of the deceased, before the issuance of letters: *Jahns v. Nolting*, 29 Cal. 507. Such an action may be maintained without the aid of section 116 of the probate act: Cal. Code C. P., sec. 1458; and such section does not give a new right of action, but merely increases the damages: *Id.*; consult Vol. i, p. 239, form No. 56, note 33.

62. Allegation of Embezzlement.—When the complaint in such an action alleges that the defendant embezzled, alienated, and converted to his own use the personal estate of the deceased, and prays for double damages, the plaintiff is entitled to recover double damages if the proof sustains the allegation: *Jahns v. Nolting*, 29 Cal. 507.

63. Demand of Property.—In suit by an administrator for conversion of the property of the estate under section 116 of the statute to regulate the settlement of estates, Cal. Code C. P., sec. 1458, the proof as to the right or title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and the refusal by him to surrender the property will charge him with a conversion: *Beckman v. McKay*, 14 Cal. 250.

64. Essential Averments.—A complaint in replevin, by an executor, should show the death of the testator, his leaving a will, the appointment therein of the plaintiff as executor, the probate of the will, the issuance of letters testamentary to the plaintiff, and his qualification and entry upon the discharge of his duties as executor: *Halleck v. Mixer*, 16 Cal. 575.

65. Ownership.—A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises

without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of one thousand dollars, the alleged value of the wood, sufficiently shows plaintiffs' ownership of the wood: *Halleck v. Mixer*, 16 Cal. 574.

No. 439.

x. *For Conversion of a Bond.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, one A. B. was the owner of a bond, a copy of which is annexed as a part of this complaint, and marked "Exhibit A." and by his agent, at the request of the defendant, deposited it with the defendant for the purpose of [here briefly state purpose for which it was deposited].

II. That after a reasonable time for [state purpose] and on the day of, 187., at said A. B. demanded from the defendant the said bond, or the value thereof; but the defendant refused either to return it or to pay its value to the said A. B.

III. That on the day of, 187., at, the said A. B. duly assigned to the plaintiff the said bond, together with all his right of action against the defendant and all other persons, to recover its value, or its possession, or damages.

IV. That the value of said bond at the date of said demand was the sum of dollars. [If the plaintiff is entitled to recover special damages allege the facts which show it].

[Demand of Judgment.]

66. Bond or Written Instrument.—In an action for the conversion of a bond or written instrument, the plaintiff should name the parties to it, and his declaration should show that it was an instrument in writing, although he cannot be held to an exact description: *Pierson v. Townsend*, 2 Hill, 550.

No. 440.

xi. *Claim and Delivery.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff was the owner [or otherwise] of the following

goods and chattels [of the value of dollars], to wit: [describe goods.]

II. That the defendant on the day of, 187., at the city and county of, without the plaintiff's consent, and wrongfully, took said goods and chattels from the possession of the plaintiff.

III. That before the commencement of this action, to wit, on the day of, 187., the plaintiff demanded of the defendant possession of said goods and chattels.

IV. That said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of dollars.

Wherefore the plaintiff demands judgment against the defendant.

1. For the recovery of the possession of said goods and chattels, or for the sum of dollars, the value thereof [in case a delivery cannot be had].

2. For dollars damages, and for costs of suit.

67. Action Defined.—The action for “claim and delivery of personal property,” under the practice of California, is at least commensurate with the action of detinue at common law: *McLaughlin v. Piatti*, 27 Cal. 464. It was formerly the action of replevin: *DeMott v. Hagerman*, 8 Cow. 220. The primary object of the suit is the recovery of the thing itself. The value is recovered only in the alternative, that the thing is not returned: *Hunt v. Robinson*, 11 Cal. 277. And herein lies the difference between this action and the action corresponding with the former action of trover, where an offer before suit is not equivalent to a tender: *Savage v. Perkins*, 11 How. Pr. 17; and see *Vogel v. Badcock*, 1 Abb. Pr. 176; *McCurdy v. Brown*, 1 Duer, 101.

68. Adverse Possession of Land.—The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely in good faith under claim and color of title: *Halleck v. Mixer*, 16 Cal. 579; affirmed in *Page v. Fowler*, 37 Cal. 100. But by the action of claim and delivery, the true owner of land may maintain replevin to recover wood cut on the land by one in possession of the same without color of title: *Kimball v. Lohmas*, 31 Cal. 156; *Halleck v. Mixer*, 16 Cal. 579; *Page v. Fowler*, 37 Cal. 100. The common law rule, in relation to the right of the owner of land to recover possession of cord wood cut on the land by one in possession, without color of title, commented on: *Page v. Fowler*, 28 Cal. 605. Replevin is the proper remedy to recover a package of gold sealed up in a leather bag: *Skidmore v. Taylor*, 29 Cal. 619.

69. Allegations Essential.—In an action against a sheriff for the value of a piano seized by him on an execution against the plaintiff, who claimed the same as exempt from execution, an allegation in the complaint that the plaintiff was a pianist, and that he had taught music within three months

prior to the time when his piano was seized, is not sufficient to show that teaching music was his business at the time of such seizure: *Tanner v. Billings*, 18 Wis. 163.

70. Bailee.—Replevin does not lie for goods deposited with the plaintiff by a stranger who has no interest in them: *Harrison v. McIntosh*, 1 Johns. 380.

71. Bill in Equity.—Where the recovery of the property is the primary object of the suit, as in some cases where damages will not compensate plaintiff, he should frame his bill in equity, specifying the reasons therefor, and then a decree can be made to compel specific delivery: *Nickerson v. Chatterton*, 7 Cal. 570.

72. Cepit—Detinet.—The distinction must still be preserved between the wrongful taking and the wrongful detention. If the original taking was lawful the action must be in the *detinet*: *Randall v. Cook*, 17 Wend. 53. And one, who having possession originally lawful, refuses to deliver, is not liable in the *cepit*: *Hymann v. Cook*, How. App. Cas. 419. So, the grantee in a sheriff's deed cannot have replevin in the *cepit* for timber cut by debtor during the period allowed for redemption: *Rich v. Baker*, 3 Den. 79. Replevin in the *cepit* will only lie where trespass will lie: 1 Wend. 109; 19 Id. 431; 4 Barn. & A. 614; Vin. Tresp. (M.) Pl. 11; Bac. Abr. Tresp. (E.) 2; Bro. Abr. Tresp. Pl. 58; *Barrett v. Warren*, 3 Hill, 348; *Rich v. Baker*, 3 Den. 79. And only where a present right of possession is shown: 12 Wend. 30; 3 Hill, 576; 3 Pick. 255; *Redman v. Hendricks*, 1 Sandf. 32. Replevin in the *detinet* as well as in the *cepit* will lie upon a tortious taking, for plaintiff may waive the force: *Cummings v. Vorce*, 3 Hill, 282; *Pierce v. Vandyke*, 6 Id. 613; *Zachrisson v. Ahman*, 2 Sandf. 68. And in such case, a demand before suit is not necessary: Id.; *Stillman v. Squire*, 1 Den. 327.

73. Character or Capacity.—It is not necessary to designate a public officer defendant by his official character. He is to be rendered liable in his individual capacity: *Stillman v. Squire*, 1 Den. 327. The deputy may be joined with principal: *Waterbury v. Westervelt*, 9 N. Y. 598; *King v. Orser*, 4 Duer, 431.

74. Claim to Property.—It is the privilege of the plaintiff to claim the delivery of the property at any time before the filing of the answer, but it is not compulsory upon him to do so: *Wellman v. English*, 38 Cal. 583. And whether he claims it or not before the answer filed, does not affect the question of ultimate relief: Id.

75. Custody of the Law.—In general, goods in the custody of the law cannot be replevied: 19 Johns. 32; 5 Mass. 283; Willes, 672; 2 Str. 1184; 1 Chitt. Pl. 160; 3 Bl. Com. 148; 1 Wend. 109; *Hall v. Tuttle*, 2 Wend. 475. Even if the execution has been paid and satisfied: *Gardner v. Campbell*, 15 Johns. 401. If the officer upon an execution against A. seizes the goods of B., the latter may bring replevin: *Thompson v. Button*, 14 Johns. 84; see 15 Id. 401; *Judd v. Fox*, 9 Cow. 259. Or, if the judgment was void for want of jurisdiction, replevin lies: *Mills v. Martin*, 19 Johns. 7.

76. Damages.—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damage is the fixed value of the property, with interest up to the time of the rendition of the

verdict: *Dorsey v. Manlove*, 14 Cal. 553; *Hamer v. Hathaway*, 33 Cal. 117. So in an action against a sheriff for wrongful seizure and sale of property: *Pelberg v. Gorham*, 23 Cal. 349; 11 Cal. 22. To be ascertained at the place where it is detained when the action is commenced: *Hisler v. Carr*, 34 Cal. 641. But where the value of the goods is fluctuating, the plaintiff may recover the highest market value at the time of the conversion, or at any time afterwards: *Douglass v. Kraft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Cal. 555; *Hamer v. Hathaway*, 33 Cal. 117; the market value to be ascertained at the place of the conversion: *Id.* Interest is allowed as a matter of right from the time when value is estimated: *Id.*; but see Civil Code, sec. 3336, as amended, 1878. The defendants are not entitled to claim compensation for money or services laid out or expended upon the plaintiff's property, in the absence of a request on his part. No request will be presumed when the property of one person is taken under legal process against another: *Hisler v. Carr*, 34 Cal. 641. The damages when the property has been delivered is the legal interest on the value thereof during the detention: *Nickerson v. Chatterton*, 7 Cal. 568. *Douglass v. Kraft*, 9 Id. 562.

77. Demand.—In this form of action a demand must be proved: *Powers v. Bassford*, 19 How. Pr. 309; *Fuller v. Lewis*, 3 Abb. Pr. 384; see *Gurney v. Kenny*, 2 E. D. Smith, 132; *Storm v. Livingston*, 6 Johns. 44. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required: *Paige v. O'Neal*, 12 Cal. 483. Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages: *Daumiel v. Gorham*, 6 Cal. 43; *Killey v. Scannell*, 12 Id. 73.

78. Execution-Creditor Joined.—If the levy was made by the direction of the execution-creditor, he also may be joined: *Allen v. Crary*, 10 Wend. 349; *Acker v. Campbell*, 23 Id. 372; *Marsh v. Backus*, 16 Barb. 483.

79. Fixtures, when Personal Property.—By the wrongful severance from the premises, the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed: *Sands v. Pfeiffer*, 10 Cal. 258.

80. Liabilities of Third Persons.—Where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention: 23 N. Y. 264; *Dunham v. Troy Union R. R. Co.*, 3 Keyes, 543. A third person, who acquires possession of the goods from a wrong-doer, is liable when notice has been given: *Olmsted v. Hotailing*, 1 Hill, 317, and cases there cited; and see *Ely v. Ehle*, 3 N. Y. 506. And against such, no demand is necessary: *Pringle v. Phillips*, 5 Sandf. 157.

81. Property Taken for Tax.—In New York, under a statute providing that replevin shall not lie for goods taken for a tax pursuant to statute: *Held*, that property taken from the owner for a tax assessed on him under a statute of the United States, cannot be replevied by him: *O'Reilly v. Good*, 42 Barb. 521; 18 Abb. Pr. 106. Yet the rightful possessor of goods unlawfully seized under a warrant against another for non-payment of taxes, may prosecute an action to recover possession of such goods, and take proceedings of claim

and delivery of such goods: *Stockwell v. Veitch*, 15 Abb. Pr. 412. In such cases the court cannot inquire into the regularity of the proceedings upon which the warrant issued: *People v. Albany*, 7 Wend. 485.

82. Relief.—If there are several defendants, the court may adjudge a return of the property in favor of such of the defendants as appear to be entitled to a return, and refuse it as to such of them as are not: *Woodburn v. Chamberlin*, 17 Barb. 446.

83. Relief, Alternative.—The judgment must be in the alternative, and not in any case absolutely, for the value of the property: *Fitzhugh v. Wiman*, 9 N. Y. 559; *Dwight v. Enos*, Id. 470.

84. Restitution and Damages.—In an action to recover possession of a mare, and damages for her detention, damages resulting from the mare's losing flesh, and the breeding season, during such detention, should be specially alleged: *Stevenson v. Smith*, 28 Cal. 102.

85. Right of Possession.—Replevin lies for goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession: *Lazard v. Wheeler*, 22 Cal. 139; *Pangburn v. Partridge*, 7 Johns. 140, and cases there cited; *Cresson v. Stout*, 17 Id. 116. A bill of sale of a given number of cattle, part of a herd running on the seller's ranch, giving the purchaser the right to select the number sold, and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller: *McLaughlin v. Piatti*, 27 Cal. 464. The plaintiff, by virtue of his prior actual possession of the land, will be entitled to recover, unless the defendants prove they entered in good faith, with the intention to pre-empt the land, on which hay was cut, and had actual possession of it at the time: *Page v. Fowler*, 37 Cal. 112.

86. When Replevin Lies.—That replevin lies by the owner of chattels against one who has merely directed the sheriff to levy on them: 10 Wend. 349; *Knapp v. Smith*, 27 N. Y. 277. Replevin lies wherever trespass would lie: *Pangburn v. Partridge*, 7 Johns. 140; *Marshall v. Davis*, 1 Wend. 109. This does not mean that the remedies are always concurrent, but that wherever trespass would lie, and the defendant was in possession of the goods, replevin would lie: *Roberts v. Randel*, 3 Sandf. 707; further qualified as meaning that it would lie where trespass might be brought: *Thompson v. Button*, 14 Johns. 84; *Clark v. Skinner*, 20 Id. 465. Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a pre-emption right, entered when he cut the hay: *Page v. Fowler*, 28 Cal. 606; affirmed in *Page v. Fowler*, Oct. T. 1869. The action for replevin would not lie for emblements cut and taken by a person who was at the time of the taking in possession of the land: *Rich v. Baker*, 3 Den. 79; *DeMott v. Hagerman*, 8 Cow. 220. A safe in the possession of McC., belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained \$6,000 in coin. Of this sum four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC. seized \$1,800 of the money in the safe as his property, and put it in a

bag. Plaintiff then claimed the money as his, McC. being present and not objecting: *Held*, that this amounted to a segregation of the \$1,800 from the mass of coin in the safe, so as to sustain replevin by plaintiff: *Griffith v. Bogardus*, 14 Cal. 410.

87. When Action will not Lie.—If an officer by his misconduct induces a sale of property for less than it would otherwise have brought, the remedy must be by an action for damages for the loss resulting from his acts, and not an action to recover the property or its value: *Foster v. Coronel*, Oct. T. 1867.

88. Wrongful Detention.—This action is based upon a wrongful detention of the property; and such wrongful detention must exist at the commencement of the suit: *Savage v. Perkins*, 11 How. Pr. 17. But facts must be shown, as the averments in a complaint of “wrongful and unlawful” may be stricken out as surplusage: *Halleck v. Mixer*, 16 Cal. 574.

89. Wrongful Taking. Alleging that the defendant took the plaintiff's property, and unjustly detains the same, sufficiently imports a wrongful taking: *Childs v. Hart*, 7 Barb. 370; compare *Reynolds v. Lounsbury*, 6 Hill, 534; see Note 40.

CHAPTER II.

FOR REAL PROPERTY.

No. 441.

i. Ejectment, Alleging Title in Fee-simple.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., he was seised in fee and possessed and entitled to the possession of that certain tract of land situated in the county of, state of, described as follows: [description of property].

II. That while the plaintiff was so seised, the defendant afterwards, on the day of, 187., and without right or title entered into possession of the demanded premises, and ousted and ejected plaintiff therefrom, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of dollars.

III. That the value of the rents, issues, and profits of said premises from the said day of, 187., and while the plaintiff had been excluded therefrom by the defendant, is dollars.

Wherefore the plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the demanded premises, and for the sum of dollars, damages for withholding the possession thereof.

2. For the sum of dollars, the value of the said rents, issues and profits, and costs of suit.

1. Color of Title.—Color of title is that which in appearance is a title, but which in reality is no title. It is that which the law will consider *prima facie* a good title, but which by reason of some defect, not appearing on its face, does not in fact amount to title. An absolute nullity, as a void deed or judgment, will not constitute a color of title: *Bernal v. Gleim*, 33 Cal. 668.

2. Conveyance pending Suit.—The conveyance of the demanded premises by the plaintiff in ejectment pending the suit, to a person not a party to the action, does not necessarily defeat the action: *Barstow v. Newman*, 34 Cal. 90.

3. Damages.—In Wisconsin, the damages in ejectment which the plaintiff is entitled to recover, include only the rents and profits, and not damages for injuries done to the premises: *Racquette v. Pickness*, 19 Wis. 219. It is otherwise in California, where damages may be also recovered in the same action: See *post*, "Rents and Profits." Where damages for use and occupation prior to the commencement of the action are claimed, the plaintiff should state the title of the plaintiff as existing at some prior date; designating it, and as continuing up to the commencement of the action, and the entry of the defendant at some date subsequent to that of the alleged title as in this form: *Payne v. Treadwell*, 16 Cal. 220. Where there is no other proof of ouster than a denial of plaintiff's title in the answer, the plaintiff can only recover damages from the date of the commencement of the suit: *Miller v. Myers*, 46 Cal. 535. It is error to award damages where none are alleged in the complaint: *McKinlay v. Tuttle*, 42 Cal. 570.

4. Constructive Possession.—A party who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure or possession, but acquires constructive possession of the entire tract, if it is not in the adverse possession of any other person at the time of his entry; and such person, in an action of ejectment, will prevail against one who enters subsequently upon the uninclosed part, as a mere intruder: *Walsh v. Hill*, 38 Cal. 481. But there must be some show of good faith, which does not appear in taking a deed from a stranger having no title, and asserting no claim: *Id.* Where a party enters upon land with no higher evidence of title than that which the law presumes from his possession, and distinctly marks out the extent and boundaries of his claim, his actual possession of a part within these boundaries gives him constructive possession of the whole: *Plumer v. Seward*, 4 Cal. 94.

5. Deed as Evidence of Title.—Parties and privies are bound by the recitals of a deed through which they claim title: *Holmes v. Ferguson*, 1 Or.

220; *Graham v. Meeks*, Id. 325. After the admission of a deed in evidence in ejectment, it is necessary for the party claiming under it to show that it includes the premises in controversy: *Walbridge v. Ellsworth*, 44 Cal. 353. In California a deed made prior to the passage of the act concerning conveyances must be first recorded, in order to have priority over a subsequent deed from the same vendor to a *bona fide* purchaser for value without notice: *Anderson v. Fisk*, 36 Cal. 625; citing *Call v. Hastings*, 3 Cal. 179; *Stafford v. Lick*, 7 Cal. 479; and *Clark v. Troy*, 20 Cal. 223. An absolute deed from defendant in ejectment to the plaintiff gives the plaintiff a right of recovery, notwithstanding it be shown to be a mortgage unless the defendant also show an offer to redeem or tender of the amount due: *Hughes v. Davis*, 40 Cal. 117. Under the plea of the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was intended to be a mortgage: *Davenport v. Turpin*, 43 Cal. 597.

6. Demise.—Though the demise is a fiction, the plaintiff must count on one which if real would support his action: *Lessee of Binney v. Chesapeake and Ohio Canal Co.*, 8 Pet. 214. Where the right of entry is by virtue of the title of the wife, the demise may be laid in the name of the husband, or in the names of both husband and wife: *Woodward v. Brown*, 13 Pet. 1.

7. Description of Premises.—If the description of the demanded premises does not appear upon the face of the complaint to be insufficient, it is a question of fact for the court or jury whether the description in the same will apply to the land sought to be recovered: *Moss v. Shear*, 30 Cal. 468; see also *Spect v. Gregg*, 51 Cal. 198. In an action for the recovery of real property it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it: Cal. Code C. P., sec. 455. Section 58 of the old statute, which this supersedes, required the land to be described by metes and bounds, and it was held that this section of the Practice Act is directory only; if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this subject, the plaintiff may, after verdict, take judgment, and the court cannot set it aside on motion of defendant on account of this defect of pleading: *Whitney v. Buckman*, 19 Cal. 300; *Beard v. Federy*, 3 Wall. U. S. 478.

8. Description—Quantity.—As respects premises claimed, less certainty of description is required now than formerly. Thus the lessor of the plaintiff on a lease for a specific number of acres, may recover any quantity of a less amount: *Barelay v. Howell*, 6 Pet. 498. But he cannot recover more than is described in the complaint: *Patten v. Cooper*, 1 Cooke, Tenn. 133. Where the premises were described as "about fifty acres," etc.: *Held*, that the description was sufficient: *St. John v. Northrup*, 23 Barb. 25.

9. Description by Designation.—Where a complaint in ejectment describes the land thus: "All that certain tract or parcel of land situated in Napa county, consisting of a pre-emption claim of one hundred and sixty acres of land, commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging, and being about five miles from Napa city in a northerly direction," it is sufficient: *Whitney v. Buckman*, 19 Cal. 300.

10. Description by Lines.—Monumental lines or points control such as are described by course and distance only. The intention of the parties

should be ascertained by a consideration of the entire description: *Piercy v. Crandall*, 34 Cal. 334. A description of real property in a complaint in ejectment, giving one of the lines bounding the premises as running due west to the source of a designated creek, is not so insufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one source of the creek, that fact cannot be taken advantage of by demurrer. It can only be matter for proof on the trial: *Carpentier v. Grant*, 21 Cal. 140. Where the complaint gave a description which embraced nothing whatever, it was held that the complaint was bad: *Budd v. Bingham*, 18 Barb. 494.

11. Description by Indication.—By indication, a description is sufficient which indicates and identifies the premises: *Paul v. Silver*, 16 Cal. 73; *Grady v. Early*, 18 Id. 108. A complaint in ejectment, describing the premises as "Lot No. 1, in Block No. 23, as per plot of the town of Red Bluff Land Corporation, in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated by the terms, "in said county," referring to the designation "county of Tehama" in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property: *Doll v. Feller*, 16 Cal. 432.

12. Description by Name.—Where the land is described in the complaint by a certain name, it is sufficient if it can be rendered certain by evidence: *Castro v. Gill*, 5 Cal. 40; *Stanley v. Green*, 12 Id. 148; *Orton v. Noonan*, 18 Wis. 447. Where the complaint in ejectment avers that the land sued for is known by the name of "La Jota," heretofore granted to plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings before the land commission, and the United States court for confirmation, these recitals in the patent support the averment of title through the grant: *Yount v. Howell*, 14 Cal. 465; see *Budd v. Bingham*, 18 Barb. 494.

13. Description, Variance in.—As to variance between the allegations and the proof respecting the premises, see *Kellogg v. Kellogg*, 6 Barb. 116.

14. Entry and Right of Possession.—To entitle plaintiff to recover, he must not only have a right of entry at the time of the trial, but must have had it also when the suit was brought: *Kile v. Tubbs*, 32 Cal. 332; *Meeks v. Kirby*, 47 Id. 168. And that right of entry cannot be impaired by any fraud, misrepresentation, or collusion practiced by him to obtain possession; *Depuy v. Williams*, 26 Cal. 309. But an entry upon a lot in possession of another is not complete until he has expelled the other party, and has effected an exclusive lodgment: *Valencia v. Couch*, 32 Cal. 339. An entry, with full notice of plaintiff's rights, during the temporary removal of his inclosure, cannot be defended on the ground that the lands were uninclosed: *Sweetland v. Hill*, 9 Cal. 556. A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person: *Gregory v. Haynes*, 13 Cal. 591.

15. Essential Averments.—In the action of ejectment, the material facts which are essential to be alleged by the plaintiff are: First. The title of the plaintiff; Second. Possession by the defendant. None of the techni-

cal allegations peculiar to the old practice are necessary: *Payne v. Treadwell*, 16 Cal. 220. Under our system the plaintiff is not limited to any form of complaint. He may aver seisin in fee, or some estate therein, or prior possession and ouster; but whatever is put in issue will be final and conclusive: *Stark v. Barrett*, 15 Cal. 361; *Caperton v. Schmidt*, 26 Id. 479; *Payne v. Treadwell*, 16 Id. 220. Where the allegations of a complaint in the district court are, that the plaintiff was in possession, and lawfully entitled to the possession, at the time he was evicted by the defendant: *Held*, that the complaint must be treated as a declaration in ejectment: *Ramirez v. Murray*, 4 Cal. 293.

16. Entry, Insufficient.—A mere entry, without color of title, accompanied by a survey and marking of boundaries, is not sufficient: *Murphy v. Wallingford*, 6 Cal. 648. So, occupation and cultivation can have no greater effect than a private survey: *Waterman v. Smith*, 13 Cal. 373. And a mere survey and marking the lines of a boundary, without an inclosure of the premises, is not a possession in law, unless made so by compliance with the statutes in reference to possessory actions on public lands: *Bird v. Dennison*, 7 Cal. 297. So, the mere inclosure of the lot with a brush fence from two to three feet high, without any other steps taken to subject the property to any use, is not sufficient evidence of ownership or right of possession: *Hutton v. Schumaker*, 21 Cal. 453. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued: Cal. Code C. P., sec. 320.

17. Form of Action.—The plaintiff is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seised of the premises, or of some estate therein, in fee, for life, or for years, or he may aver a former possession and ouster; but whatever is put in issue and determined, is conclusive and final: *Caperton v. Schmidt*, 26 Cal. 490; see, also, *Steinback v. Fitzpatrick*, 12 Id. 295. In New York, the complaint in an action under the code to recover the possession of real property need not be drawn in the form employed in declarations in ejectment suits, under the revised statutes: *Walter v. Lockwood*, 4 Abb. Pr. 307. Both the complaint and answer in such actions should conform to the rules of pleading laid down in the code, and their sufficiency is to be tested by those rules: Id. The case of *Warner v. Nellingar*, 12 How. Pr. 402; and *Lawrence v. Dwight*, 2 Duer, 673, disapproved.

18. Highways.—Ejectment lies by the owner in fee against one who has exclusively appropriated a part of a public street or highway to his own private use: 1 Burr. 133; 15 Johns. 447; *Brown v. Galley*, Hill & D. Supp. 308. And in case of a toll road, where plaintiff owns the fee, and is excluded by the defendant, except on payment of toll, and then only admitted for the purpose of passing over the land, ejectment lies: *Mahon v. San Rafael T. R. Co.*, 49 Cal. 269. And where the owner in his conveyance excepts the portions included in the highway, he may maintain ejectment against his grantee for encroachments thereon, or exclusive occupation: *Smith's Lead. Cas.* 183; *Etz v. Daily*, 20 Barb. 32. But the possession must be exclusive of the public: *Redfield v. Utica & Syracuse R. R. Co.*, 25 Barb. 54. Possession of land adjoining a road for seventy years is sufficient to enable plaintiff to maintain ejectment as to the roadway where the possession has been under a

deed which describes that boundary as made by the road simply, without mentioning it as made by any particular line of the road: *Dunham v. Williams*, 36 Barb. 136. That ejectment is a proper remedy for the appropriation of a highway: See 24 N. Y. 655; *Lozier v. N. Y. Cent. R. R. Co.*, 42 Barb. 465; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526.

19. Identifying Land in Controversy.—Where plaintiff claims title under deed from the commissioners of the funded debt of the city of San Jose, it is incumbent on the plaintiff to show that the premises had not been granted or conveyed by the pueblo or the city prior to the execution of the deed of the commissioners to the plaintiff's grantor: *Halloway v. Galliac*, Cal. Sup. Ct., Oct. T., 1869. So, where the conveyance was of "the balance" of the tract of fourteen hundred acres, the court held that it was necessary to show what "the balance" was, and that it included the land in controversy: *Taylor v. Taylor*, 3 A. K. Marshall, 19; *Mayor and Common Council of San Jose v. Uridias*, 37 Cal. 339; cited in *Halloway v. Galliac*, Cal. Sup. Ct., Oct. T., 1869. A party claiming title under a deed cannot show title to the premises in controversy by the mere production and proof of the deed; he must show that the description of the land in the deed includes the land in controversy; *Halloway v. Galliac*, Cal. Sup. Ct., Oct. T., 1869; see, also, *Valentine v. Jansen*, Id.; and *McGarvey v. Little*, 15 Cal. 27. Where there is a mistake in the first call of a deed, and the remaining calls are sufficient to identify the land, the court may hold that the land in controversy is covered by the deed: *Moss v. Shear*, 30 Cal. 479; *Reamer v. Nesmith*, 34 Id. 624; cited in *Walsh v. Hill*, 38 Id. 481.

20. Injunction.—In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of the equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought: *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 544. And in such case if the complaint states a good cause of action in ejectment it will not be dismissed, even though the portion upon which the injunction is asked should not justify such relief: *McNeady v. Hyde*, 47 Cal. 481.

21. Intervention.—In ejectment the matter in litigation is the right to the possession on the part of the plaintiff and his ouster by the defendant. And a party who merely sets up title in himself, but in no way connects himself either with this right of possession or ouster has no right to intervene: *Porter v. Garrissino*, 51 Cal. 559.

22. Joinder of Actions.—A claim to recover possession of a farmhouse and yard, occupied by plaintiff's permission, and damages for trespass on the farm, cannot be joined in one complaint: *Hulce v. Thompson*, 9 How. Pr. 113. For a claim for injuries to the freehold cannot be joined with demand for reserve profits: *Frost v. Duncan*, 19 Barb. 560. In Illinois, a party who holds a bond and mortgage to secure a debt may maintain an action of ejectment to recover the mortgaged premises, foreclose the equity of redemption in chancery, and sue on the bond, and have all these actions proceed at the same time: 3 Scam. 203; 26 Ill. 9.

23. Illinois. Under the limitation laws of Illinois, two things are necessary: First, Possession; and, Second, A connected title at law or equity: See

Arrowsmith v. Burlingim, 4 McLean, 489; *Moore v. Brown*, 11 How. U. S. 414; affirming, S. C., 4 McLean, 211; consult Rev. Stats. of Ill., 1874, p. 674.

24. Joint Liability. If one of two defendants, with the knowledge and consent of the other, employs men to remove buildings and fences from land, turn out the occupants and take possession, the acts performed and possession so acquired are as much the acts and possession of the one who assented to them in advance, and for whose benefit, in part, such possession was taken and held, as of the party who actually employed the men and directed the acts to be done: *Treat v. Reily*, 35 Cal. 129.

25. Land Subject to Easement. Notwithstanding the land is subject to a public easement, *e. g.*, where it has been appropriated as a street, the owner of the fee may maintain an action in the nature of ejectment against one occupying it unlawfully, *e. g.*, by laying a railroad track on it: *Carpenter v. Oswego & Syracuse R. R. Co.*, 24 N. Y. 655; but see *Wilklow v. Lane*, 37 Barb. 244; see also *Mahon v. San Rafael T. R. Co.*, 49 Cal. 269. But an action of ejectment does not lie against a municipal corporation for using and grading plaintiff's land as a street. Such acts are evidence only of a claim to a mere easement: *Cowenhoven v. City of Brooklyn*, 38 Barb. 9. A municipal corporation may maintain ejectment for land of which it owns the legal title, notwithstanding it is held in trust for public use as a street: *San Francisco v. Sullivan*, 50 Cal. 603. The action of an ejectment does not lie for an easement which is not a title to or interest in land: 3 Kent's Com. 419; 5 Barn. & C. 221.

26. Matters Redundant. Matters of evidence, such as averments of deraignments of title, and unnecessary matters of description of demanded premises, should be stricken out of a complaint in ejectment: *Larco v. Casanueva*, 30 Cal. 560; *Depuy v. Williams*, 26 Cal. 313; *Wilson v. Cleveland*, 30 Cal. 192. The complaint need not state the residence of the parties: *Doll v. Feller*, 16 Cal. 433. Allegations that defendant's possession is "unlawful," and plaintiff's title is "lawful," are wholly unnecessary: *Payne v. Treadwell*, 16 Cal. 220; *Sanders v. Leavy*, 16 How. Pr. 308. Nor is it necessary to set out the mesne conveyances through which the plaintiff deraigns title: *Norris v. Russel*, 5 Cal. 249; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323; *Gladwin v. Stebbins*, 2 Id. 103; and see *Hagley v. West*, 3 L. J. Ch. 63; since these are but averments of evidence, and are not admitted by a failure to deny them in the answer: *Siter v. Jewett*, 33 Cal. 92; see also *Doyle v. Franklin*, 48 Id. 537. And a complaint in ejectment should not state matters of evidence, but only the ultimate facts constituting the cause of action: *Depuy v. Williams*, 26 Cal. 309. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion without benefit: *Garrison v. Sampson*, 15 Cal. 93.

27. Measure of Relief.—A complaint may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial: *Boles v. Cohen*, 15 Cal. 150. Distinct parcels of land may not only be included in one complaint, if covered by one title, but a demand for their rents and profits, or for damages for withholding them, may also may included: *Beard v. Federy*, 3 Wall. U. S. 478. In an action to recover possession of land; brought against a party who was a naked trespasser upon his entry,

and who, while such trespasser, made improvements, but afterwards became a co-tenant, the plaintiff can recover the increased value of the rents and profits arising from such improvements: *Carpentier v. Mitchell*, 29 Cal. 330.

28. Mexican Grants.—One who, without the permission of the grantee, takes possession of land within the boundaries of a Mexican grant, whether perfect or inchoate, before the final survey is made by the United States, is guilty of an ouster, although informed by the grantee that the land so taken is not within the limits of the grant: *Love v. Shartzer*, 31 Cal. 487. For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant, although no official survey and measurement has yet been made by the officers of the Government, and although it may appear, when such survey and measurement are made, that there exists within the exterior limits of the general tract a quantity exceeding the eleven leagues: *Cornwall v. Culver*, 16 Cal. 423; affirmed in *Riley v. Heisch*, 18 Cal. 198; see, also, *Mahoney v. Van Winkle*, 21 Cal. 552. If, after the death of the grantee of an unconfirmed Mexican grant, his heirs petition for and obtain a confirmation of the title and patent to themselves, the legal title vests in them, and will prevail in ejectment against purchasers from the administrator of the Mexican grantee under orders of the Probate Court, in the absence of a valid equitable defense. Such title does not inure to the purchaser at the administrator's sale so as to vest in him the legal title: *Hartley v. Brown*, 51 Cal. 465. One who relies on a confirmed Mexican grant as a source of title must show that the premises in question are within the decree of confirmation: *Brown v. Brackett*, 45 Cal. 167.

29. Missouri.—The act of 1826, regulating ejectment, requires the plaintiff to allege not only that he is entitled to the premises, but that he is legally entitled to the possession of them: R. S., 1825, 343: *Jamison v. Smith*, 4 Mo. 202. A wife cannot be joined with her husband as defendant in ejectment, merely for the reason that she lived with him upon the premises: *Meegan v. Gunsollis*, 19 Mo. 417. And if a female, in an action of ejectment, marries while the case is pending, the plaintiff is not bound to make the husband a party, unless the latter applies to be made such: *Evans v. Greene*, 21 Mo. 170. A mortgagee may maintain ejectment against the mortgagor or those claiming under him: *Walcop v. McKinney*, 10 Mo. 229. One will not be allowed to recover property under a deed which does not include within its description the property claimed, although the party under whom he claims, holding by a deed with a similar description of the premises, may have acquired title by adverse possession or in some other manner: *Menkins v. Blumenthal*, 19 Mo. 496. An executor or administrator, as such, cannot maintain ejectment for lands of which the testator or intestate died seized: *Burdyne v. Mackey*, 7 Mo. 374. Ejectment cannot be maintained against a minor upon the possession of his guardian: *Spitts v. Wells*, 18 Mo. 468.

30. Mortgage.—The mortgagee will not be permitted to set up an adverse possession to bar the rights of the mortgagor, unless it has existed long enough to constitute an equitable bar from lapse of time: *Gordon v. Hobart*, 2 Sumn. 401; compare *Dexter v. Arnold*, 2 Id. 152. Nor is the possession of the mortgagor adverse to the rights of the mortgagee: *Higginson v. Mein*, 4 Cranch. 415; see, also, *Conner v. Whitmore*, 52 Me. 185; where it is held a mortgagor cannot maintain ejectment against a mortgagee in possession. But

after forfeiture the mortgagee may maintain ejectment: 2 Ohio, 223; 3 Scam. 203; 30 Ill. 224. In California the practice is to foreclose the mortgage and sell the property, and mortgagee cannot maintain ejectment until he has a sheriff's deed: See Cal. Civ. Code, sec. 2927. The purchaser at a foreclosure sale is entitled to a writ of assistance on motion, and to be placed in possession thereunder without resorting to ejectment: *Montgomery v. Tutt*, 11 Cal. 190; *Montgomery v. Middlemiss*, 21 Id. 103. *Frisbie v. Fogarty*, 34 Cal. 11. A bare mortgage of the premises will not sustain such action, under the rule that a mortgagee cannot bring ejectment for the mortgaged premises: See *Sahler v. Signer*, 37 Barb. 329. That no action of ejectment shall be maintained by a mortgagee applies to one who holds by a conveyance, absolute upon its face, but really given to secure a debt: *Murray v. Walker*, 31 N. Y. 399. The title of a mortgagee in possession after condition broken, is not divested by sale on a judgment against the mortgagor, so as to allow a recovery in an action of ejectment by a purchaser at such sale. It is otherwise, however, if the mortgagee never took possession: *Hall v. Tunnell*, 1 Houst. 320.

31. Ouster.—The averment of wrongful withholding is equivalent to averment of an ouster: *Marshall v. Shafter*, 32 Cal. 176. And the ouster must be alleged subsequent to the date of plaintiff's title: *Coryell v. Cain*, 16 Cal. 567. But the complaint need not state the exact time of the alleged ouster, especially where no claim is made for damages, and no recovery had for them—the allegation in this case, as to time of ouster, being “on or about, 187 . . .” *Collier v. Corbett*, 15 Cal. 183. The date of the ouster need not be alleged: *Woodward v. Brown*, 13 Pet. 1. The date is only material with reference to mesne profits: *Stark v. Barrett*, 15 Cal. 361. Under an allegation of an ouster, a holding over may be shown: *Garrison v. Sampson*, 15 Cal. 93. In an action against plaintiff's co-tenant it is sufficient for the plaintiff to show that the defendant's entry into possession was under a claim hostile to the rights of the plaintiff: *Clason v. Rankin*, 1 Duer, 337. Adverse holding and claim of title do not of themselves constitute an ouster as between co-tenants unless the tenant out of possession is informed thereof; but a denial of plaintiff's title in the answer of the defendant is sufficient proof of an ouster: *Miller v. Myers*, 46 Cal. 535; *Spect v. Gregg*, 51 Id. 198; see also *Abbey Homestead Assn. v. Willard*, 48 Cal. 614, and *Packard v. Johnson*, 51 Cal. 545. To enable the plaintiff to recover on prior possession, he must allege and prove an actual ouster: *Watson v. Zimmerman*, 6 Cal. 46. As to allegation of ouster being necessary for a recovery, see *Lawton v. Gordon*, 37 Cal. 207.

32. Overflowed Lands.—A grant of land under water, for the purpose of erecting a wharf thereon, is not an easement. The right to build a wharf and take tolls is an easement. But as incident to this right, a grant of the use and occupancy of a strip of overflowed land conveys an estate in the land which authorizes the grantees to take possession, occupy and control it for the purposes of the grant. It is something of which they could be dispossessed, and, if ousted, ejectment would lie: *Champlain and St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 487. Where a right of entry existed, and the interest is tangible so that possession could be given, ejectment would lie: *Frisbie v. McClernin*, 38 Cal. 568. So, though it will not lie for a water-course, yet it will lie for the ground over which the water passes: Yelv. 143.

33. Owner.—The allegation that the plaintiff “is the owner” of the land is in substance an allegation of seisin in fee, in “ordinary” instead of technical language: *Garwood v. Hastings*, 38 Cal. 216; citing *Payne v. Treadwell*, 16 Cal. 242, 244.

34. Parties Plaintiff.—At the common law the grantee of the reversion could not enter or bring ejectment for breach of the covenants of a lease: *Sheets v. Selden's Lessee*, 2 Wall. U. S. 177. Where a landlord, after the execution of a lease, failed to put the tenant in possession of the entire property, and the tenant accepts possession and enters upon a part, this will be deemed an abandonment of the lease as to the residue, and the landlord may maintain ejectment therefor, against a third person notwithstanding the lease: *Camarillo v. Fenlon*, 49 Cal. 202. In Ohio, a wife under a decree giving her the use of a house and lot for alimony may recover the possession in an action of ejectment: *Wright*, 205. Even in case of a naked trustee, in general the court will not go behind the naked legal title and inquire into the equities. A trustee may recover in ejectment against the *cestui que trust*: 5 Gilm. 236; 31 Ill. 468; *Phillpotts v. Blasdel*, 8 Nev. 61. But not where he holds the legal title simply on an express trust, without the right of possession: *Tyler v. Granger*, 48 Cal. 259. A petitioner in insolvency may maintain ejectment to recover the homestead: *Moore v. Morrow*, 28 Cal. 551.

35. Parties Defendant.—An action of ejectment to recover land in the possession of an employee should be brought against the employer, where the occupation of the employee is simply the occupation of his employer: *Hawkins v. Reichert*, 28 Cal. 534. But where the employer is not amenable to an action, as in the case of possession by an officer of the United States, the rule does not apply, and such employee is the proper defendant: *Polack v. Mansfield*, 44 Cal. 36. In ejectment, one or several defendants may be sued: *Ellis v. Jeans*, 7 Cal. 409. Where a defendant in ejectment is sued by a fictitious name, notwithstanding he appears and answers in his true name, the complaint must still be amended by inserting his true name, with apt words charging him with an ouster to sustain a judgment against him on a direct appeal: *McKinlay v. Tuttle*, 42 Cal. 570; see, also, *Lawrence v. Ballou*, 50 Id. 258.

36. Pennsylvania.—The common law remedy by ejectment, as a means of compelling specific performance, is not taken away in Pennsylvania by the grant of equity powers to the courts of common pleas: *Corson v. Mulvany*, 49 Penn. 88. The grant of land by the government passes at once to the grantee the legal possession as well as the title, which continues until he is disturbed by an actual adverse possession: 8 Cranch, 229; *Potts v. Gilbert*, 3 Wash. C. Ct. 475. As to effect of paying taxes or of omitting to pay taxes, and buying in at a tax sale, see *Girard v. City of Philadelphia*, 2 Wall. Jr. C. Ct. 301; *Ewing v. Burnett*, 11 Pet. 41; 1 McLean, 266; *Wilkes v. Elliot*, 5 Cranch C. Ct. 611.

37. Possession by Plaintiff.—A complaint which shows that the plaintiff is in possession, is bad on demurrer: 2 Cai. 335; *Taylor v. Crane*, 15 How. Pr. 358; see, also, *Hulce v. Thompson*, 9 Id. 113; *Budd v. Bingham*, 18 Barb. 494; *Frost v. Duncan*, 19 Id. 560.

38. Possession by Defendant.—The burden of showing five years' adverse possession is on the defendant. The plaintiff having shown title, the

possession is presumed to follow the title: *Garwood v. Hastings*, 38 Cal. 223; but see *Lawrence v. Ballou*, 50 Id. 258. If it be shown that defendant was in possession before and after suit, plaintiff need not show him to be in possession on the day suit is brought: *Doe v. Roe*, 30 Ga. 553. Nor need the possession be actual as contra-distinguished from constructive possession: *Crane v. Ghirardelli*, 45 Cal. 235. It would seem that in Wisconsin, it is not necessary to allege that defendant is in possession at the time of the commencement of the action: *Herrick v. Graves*, 16 Wis. 157. The possession by the defendant is an issuable fact, and its possible rightful character need not be negatived: *Payne v. Treadwell*, 16 Cal. 244. And a continued adverse holding must be shown: *Steinback v. Fitzpatrick*, 12 Cal. 295.

39. Possession as Evidence of Title.—See *Hicks v. Davis*, 4 Cal. 69; *Plume v. Seward*, 4 Id. 94; *Murphy v. Wallington*, 6 Id. 649; *Wolf v. Baldwin*, 19 Id. 314; *Dyson v. Bradshaw*, 23 Cal. 537; *Hutchinson v. Perley*, 4 Id. 33; *Bird v. Lisbros*, 9 Id. 1; *Norris v. Russel*, 5 Id. 249; *Sac. Vall. R. R. Co. v. Moffatt*, 7 Id. 577; *Donahue v. Gallavan*, 43 Id. 573. So of agricultural land as against a trespasser: *Burdge v. Smith*, 14 Cal. 380. That the possession of real property raises the presumption of title in the possessor, see *Bernal v. Gleim*, 33 Cal. 668. It is evidence of seisin in fee: *Keane v. Cannovan*, 21 Cal. 291. And the possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff: *Rose v. Davis*, 11 Cal. 133. But it must be an actual *bona fide* occupation or *possessio pedis*, and not a mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc.: *Plume v. Seward*, 4 Cal. 94. Nor by insufficient fencing without actual occupation: *Borel v. Rollins*, 30 Cal. 408. But the fact that a person is in the possession of one acre does not raise any presumption that he has title to an unlimited tract in the same neighborhood: *Havens v. Dale*, 18 Cal. 359. Nor is the possession of one lot to be deemed a possession of other lots of a tract subdivided: Cal. Code C. P., sec. 322. It is error to instruct the jury that the defendant being in possession it is necessary for plaintiff to show an earlier and better possession in order to recover: *Sweeney v. Reilly*, 42 Cal. 402.

40. Possession as Notice of Title.—Open and notorious possession of land, existing at the time of the acquisition of title or deed of the subsequent vendee, is evidence of notice to him of title, even though the first vendee have an unrecorded deed for it: *Hunter v. Watson*, 12 Cal. 363. And this rule applies as well to any other title consistent with the possession: *Partridge v. McKinney*, 10 Cal. 181; *Havens v. Dale*, 18 Id. 359; *Woodson v. McCune*, 17 Id. 298; see, also, *Lestrade v. Barth*, 19 Id. 660; *Dutton v. Warschauer*, 21 Id. 609; *Fair v. Stevenot*, 29 Id. 486. So, such possession by a tenant is sufficient to put the purchaser upon inquiry as to the landlord's title: 21 Cal. 609; *Landers v. Bolton*, 26 Id. 393. The possession of the grantor is that of the purchaser: *Ellis v. Jeans*, 7 Cal. 409. A purchaser of the legal title has notice of the equity of another in possession: *Bryan v. Ramirez*, 8 Cal. 461; see, also, *Morrison v. Wilson*, 13 Id. 494.

41. Property in Another.—When parties assert, either by declaration or conduct, the title to the property to be in others, the statute of course cannot run in their favor, and their possession is not adverse: *McCracken v. City of San Francisco*, 16 Cal. 591. Nor can a mere intruder defeat a recovery or diminish the damages which might otherwise be recovered against him by

showing an outstanding title in a third person: *Southmayd v. Henley*, 45 Cal. 101.

42. Public Lands.—To constitute adverse possession on public lands, it is sufficient if the party in possession claims against all the world, except the United States. It is not necessary that he possesses under color of title: *Page v. Fowler*, 28 Cal. 605. But the pretended possession of land with an insufficient inclosure, but without actual occupancy, will not establish adverse possession: *Borel v. Rollins*, 30 Cal. 408; *Hughes v. Hazard*, 42 Id. 149. But one claiming to have acquired a title to land by adverse possession of five years, need only show that such possession was held by an inclosure, and need not prove occupation, cultivation, or use of the premises: *Polack v. McGrath*, 32 Cal. 15; *Ewing v. Burnett*, 11 Pet. 41; affirming S. C., 1 McLean, 266; and see *Watkins v. Holman*, 16 Pet. 25. A settler on public land is entitled to a reasonable time after his location within which to inclose it or make improvements necessary to its enjoyment; and during such time he will be protected the same as if he had perfected possession by inclosure or otherwise: *Staininger v. Andrews*, 4 Nev. 59.

43. Rents and Profits.—Where rents and profits are claimed prior to the commencement of the action, the complaint must state the title of the plaintiff as existing at some prior date and continuing up to the commencement of the action, and the entry of the defendant at some date subsequent to that of the alleged title: *Payne v. Treadwell*, 16 Cal. 248. He is entitled to damages measured by the value of the rents and profits up to the time the judgment is rendered: *Love v. Shartzer*, 31 Cal. 487; *Rich v. Maples*, 33 Id. 102. But the rents and profits must be shown by the complaint to be connected with, and arising out of the wrongful withholding of possession: *Tompkins v. White*, 8 How. Pr. 520; and are limited to such as accrue subsequent to the ouster alleged: *Yount v. Howell*, 14 Cal. 465; or subsequent to the accruing of his right of possession: *Clark v. Boyreau*, 14 Cal. 634. But in an action to recover possession of land on a title acquired by sheriff's sale and deed thereunder the plaintiff cannot recover the rents and profits accrued during the period allowed for redemption: *Clark v. Boyreau*, 14 Cal. 634; *Henry v. Everts*, 30 Id. 425; as the right depends upon title. An allegation of the value of the use and occupation, rents and profits of the premises for the period during which defendants were in the wrongful possession and excluded plaintiff, is sufficient to charge defendants without any averment that they received such rents and profits: *Patterson v. Ely*, 19 Cal. 28; see, further, note 56.

44. Rents and Profits—Demand for.—In Ohio, the demand for rents and profits is deemed a separate cause of action, and should be separately stated: See Swan on Pl. 444; Ohio Code, secs. 80, 81; *McKinney v. McKinney*, 8 Ohio St. 423. So in New York: *Holmes v. Davis*, 21 Barb. 265. A demand of damages for the ouster does not cover them: *Livingston v. Tanner*, 12 Barb. 481. In California, when they are claimed in an independent suit, the record of recovery in ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had: *Yount v. Howell*, 14 Cal. 465. The legislature has no power to enable another person, who has no title, to recover from the person entitled to the possession, the rents and profits of the land: *Rich v. Maples*, 33 Cal. 102.

45. Rents and Profits—Right to.—The right to mesne profits is a necessary consequence of the recovery in ejectment: *Benson v. Matsdorf*, 2 Johns. 369; *Jackson v. Randall*, 11 Id. 405; *Baron v. Abeel*, 3 Id. 481. But defendant is only to be held liable for the time he was in possession, in fact, or in judgment of law: *Ryers v. Wheeler*, Hill & D. Supp. 389. And the measure of damages in such action is that which would obtain in *assumpsit* for use and occupation: *Holmes v. Davis*, 19 N. Y. 488. Under our practice (California) it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action: *Sullivan v. Davis*, 4 Cal. 291. And if plaintiff is in possession of a portion of the land, damages should not be assessed for the use of the entire tract: *Ellis v. Jeans*, 26 Cal. 272. And damages may be awarded on a default: *Dimick v. Campbell*, 31 Cal. 238.

46. Right of Possession.—To maintain ejectment, a right of entry and possession is all that is required. A contrary doctrine would defeat the policy in view of which pre-emption rights were conceived, by putting the settlement and improvement of the pre-emptioner at the mercy of any stranger who might choose to trespass upon them: *Toland v. Mandell*, 38 Cal. 43. A mere naked fee does not always warrant a recovery in ejectment. The plaintiff must prove the right to the possession: 11 Ill. 547; 13 Id. 251; 13 Id. 239; 25 Id. 537; 13 Wis. 474; 35 Ill. 265; *City of Cincinnati v. White*, 6 Pet. 431. But if no adverse title be shown, recovery may be had without showing the right of possession, or an entry, or a right of entry in his lessor: *Wilkes v. Elliot*, 5 Cranch C. Ct. 611. Even if the deed of such grantor purporting to convey was fraudulent: *Gregg v. Sayre*, 8 Pet. 244; *Wright v. Mattison*, 18 How. U. S. 50. The right to the possession depends upon title. So, when the vendor's title expires, his right to possession also expires. So held in a case where vendor sued to eject the purchaser, who set up title under the Homestead Law to government lands, the plaintiff in the action claiming right of possession only. If the defendant was estopped by reason of the contract of sale from setting up title, the plaintiff, by admitting he had no title, will not be admitted to set up the estoppel to show that his admission was untrue, as it would then be an estoppel against an estoppel, "which setteth the matter at large." *Holden v. Andrews*, 38 Cal. 122.

47. Seisin in Fee.—Under an allegation of seisin in fee of the premises, plaintiff may recover, if he show any interest entitling him to possession: *Stark v. Barrett*, 15 Cal. 361. And from seisin in fee, and of possession by defendant when established, the law implies a right to the present possession in the plaintiff, and a holding adverse thereto by the defendant: *Payne v. Treadwell*, 16 Cal. 220; *Salmon v. Symonds*, 24 Cal. 255. But the presumption may be rebutted by proof of an equitable title in another of the character to carry the right of possession: *Willis v. Wozencraft*, 22 Cal. 607. To sustain an action of ejectment, an averment of seisin is essential, and must be alleged to have been within the time limited for bringing the action: *Bockee v. Crosby*, 2 Paine, 432; *Salmon v. Symonds*, 24 Cal. 266; see Cal. Code C. P., secs. 318, 319. A variance between the alleged seisin and right of possession of plaintiff, and the date of the conveyance to him, is immaterial: *Stark v. Barrett*, 15 Cal. 361.

48. Settlers upon Public Land.—Persons having settled in person upon the public land, improved it, and erected dwelling houses thereon, are law-

fully in possession, have a right to be protected in it, and if ousted may sue to recover it. To maintain ejectment, a right of entry and possession is all that is required: *Paine v. Treadwell*, 16 Cal. 220; *Yount v. Howell*, 14 Id. 468; *Grady v. Early*, 18 Id. 108; *Hubbard v. Barry*, 21 Id. 321; *Bullock v. Wilson*, 2 Port. (Ala.) 437; *Masters v. Eastis*, 3 Id. 368; cited in *Toland v. Mandell*, 38 Cal. 30. A settler on public land, if ousted after the lapse of a reasonable time within which to improve it, can recover against the person in possession only by showing an actual, notorious, prior possession: *Staininger v. Andrews*, 4 Nev. Rep. 59. For insufficient possession see *Hughes v. Hazard*, 42 Cal. 149. Where he shows that he first entered upon it, marked out the boundaries, and diligently proceeded, or diligently made preparations to do such acts as were necessary to constitute an actual possession, he will be entitled, even without showing an actual possession, to recover against a person subsequently entering: *Staininger v. Andrews*, 4 Nev. 59.

49. Settler, Complaint by.—Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently, H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays for an injunction, and damages for the occupation: *Held*, that the complaint does not state facts sufficient to constitute a cause of action: *O'Conner v. Corbitt*, 3 Cal. 371. That at a certain time the party received a deed of a tract of land, and from that time forward continued in the actual, exclusive, adverse, and notorious possession, and had the same protected by a substantial inclosure, is an adverse possession: *Vassault v. Seitz*, 31 Cal. 225.

50. Statute of Limitations.—The statute of limitations distinguishes between an entry made without any right or claim of right, and one made under a claim or color of title. The naked disseisor is regarded with the greater disfavor, and his possession is strictly to the land in his actual exclusive possession, co-extensive with his metes and bounds: *Walsh v. Hill*, 38 Cal. 188; see also Cal. Code C. P., secs. 325 to 325. Peaceable and uninterrupted possession for seven years, under a grant or deed of conveyance, gives a complete title to a person in possession: *Piles v. Bouldin*, 11 Wheat. 325. And a naked trespasser for seven years is not a bar to the action: *Patton v. Hynes*, 1 Cooke, 357. But a connected title need not be shown: *Green v. Neal*, 6 Pet. 291; overruling *Patton v. Easton*, 1 Wheat. 476; *Walker v. Turner*, 9 Id. 541; and *Powell v. Harman*, 2 Pet. 241. The possession of one having no title, but holding by consent of another, may be connected with the title of such other: *McIver v. Reagan*, 1 Cooke, 366. Under the statute of Kentucky, an adverse possession under a survey previous to patent, may be connected with possession under the patent: *Walden v. Gratz*, 1 Wheat. 292. So, a party entering into possession of land under a patent, but not showing a paper title to any particular portion, is deemed as claiming to the abutments of the patent against other parties not then in seisin or possession: 2 A. K. Marshall, 18; 1 Id. 376; *Clarke v. Courtney*, 5 Pet. 319. Where a party is brought in on motion of the plaintiff as an additional defendant, after the suit has been some time pending, such defendant may avail himself of the statute of limitations up to the time he is made a party: *Lawrence v. Ballou*, 50 Cal. 258. Nor does the pendency of a suit estop the plaintiff in such action from setting up the statute of limitations in a suit subsequently brought against him: *420 Mining Co. v. The Bullion Mining Co.*, 9 Nev. 240.

51. Stipulation by Attorney.—If the attorneys of the parties stipulate in writing that one of the defendants consents to a reference, and that plaintiff will within five days execute to defendant a deed to a part of the land in controversy, such stipulation gives to defendant an equitable title to the land named, although judgment in the action is for the plaintiff: *Killey v. Wilson*, 33 Cal. 691. And where attorneys stipulate that a party brought in by motion may file an answer *nunc pro tunc* as of a former date, they are estopped from saying such party was not a defendant on such date: *Lawrence v. Ballou*, 50 Cal. 258.

52. Sufficient Allegations.—Where the complaint alleges that the plaintiff “is the owner, and entitled to the possession of the land,” “that defendant is in possession of said lot of land without any right or title thereto, and against the will and without the consent of the plaintiff,” that said defendant wrongfully withholds the possession of said lot of land from the plaintiff, it is sufficient. That the plaintiff is the owner is in substance an allegation of seisin in fee, in “ordinary” instead of technical language: *Payne v. Treadwell*, 16 Cal. 242, 244; followed in *Garwood v. Hastings*, 38 Id. 216.

53. Sufficient Complaint.—Where the complaint avers: 1. That the plaintiffs are the owners in fee, as tenants in common, of the premises; 2. That the defendants are in possession of the same, and withhold the possession thereof from the plaintiffs; it is sufficient. All beyond these averments is immaterial: *Payne v. Treadwell*, 16 Cal. 247; *Haight v. Green*, 19 Cal. 113; *Ensign v. Sherman*, 14 How. Pr. 439; *Walter v. Lockwood*, 23 Barb. 228; *Sanders v. Leavy*, 16 How. Pr. 308.

54. Tax Title.—No title can be derived from a tax sale where the tax was levied against the buyer, whose duty it was to pay it: *Moss v. Shear*, 25 Cal. 38. *Coppinger v. Rice*, 33 Id. 425; followed in *Garwood v. Hastings*, 38 Id. 216.

55. Tenants in Common.—Tenants in common are in possession of all the land held in common, and each and every one of them has the right to enter upon and occupy the whole of the common lands, and every part thereof: *Carpentier v. Webster*, 27 Cal. 545; cited in *Tevis v. Hicks*. Cal. Sup. Ct., July T., 1869. Their occupation shall be, by law between them, in common: 2 Bouvier's Inst. 314. So, one tenant in common can recover possession of the entire premises as against a mere trespasser: *Treat v. Reilly*, 35 Cal. 129; *Hardy v. Johnson*, 1 Wall U.S. 371; *Sharon v. Davidson*, 4 Nev. 416; *Rowe v. Bacigalluppi*, 21 Cal. 633; *Chipman v. Hastings*, 50 Id. 310. In Tennessee, the practice has been for the tenants in common in ejectment to declare in a joint demise, and to recover a part or the whole of the premises, according to the evidence: *Poole v. Fleeger*, 11 Pet. 185; affirming *Fleeger v. Poole*, 1 McLean, 185. Tenants in common cannot join in an action of ejectment in Missouri: *Dube v. Smith*, 1 Mo. 313; *Wathen v. English*, Id. 746.

56. Tenants in Common—Damages.—Where a party, after taking possession wrongfully, became a co-tenant of the plaintiff, the plaintiff cannot in ejectment recover damages for the period while he was wrongfully in possession: *Carpentier v. Mendenhall*, 28 Cal. 484. But a tenant in common who is ousted by his co-tenant, may recover damages from the time of the ouster according to his right: Id.; see 2 Ohio, 110; see note 3, *ante*. Where the plaintiff is owner of an undivided half interest, and the defendant, a naked

trespasser, purchased an undivided interest after the commencement of the action, plaintiff can recover the value of one half of the rents and profits, including those resulting from the improvements placed on the land by the defendant during the period of wrongful possession: *Carpentier v Mitchell*, 29 Cal. 330.

57. Termination of Plaintiff's Title Pending Suit.—Where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property: Cal. Code C. P., sec. 740; *Moore v. Tice*, 22 Cal. 513. The conveyance by plaintiff, pending suit, does not necessarily affect his right to recover; and such conveyance may be shown to be a mortgage, though on its face it is an absolute deed: *Clink v. Thurston*, 47 Cal. 21. This provision of the statute applies to all cases where the plaintiff's title from any cause ceases to exist before trial, and is not confined to cases in which the title expires by limitation: *Lang v. Wilbraham*, 2 Duer, 171. The death of the wife, without issue living, after suit brought by herself and the husband for the homestead, defeats the action: *Gee v. Moore*, 14 Cal. 472. But the sale of the premises during the action is but a transfer of the cause of action: *Moss v. Shear*, 30 Cal. 469. Though where plaintiff's title expired before judgment, if he is entitled to mesne profits he may have judgment so as to enable him to recover them: *Jackson v. Davenport*, 18 Johns. 295.

58. Title.—A plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's: *Woodworth v. Fulton*, 1 Cal. 295; *Stanford v. Mangin*, 30 Ga. 355; *Turner v. Aldridge*, 1 McAll. 229; *Sahler v. Signer*, 37 Barb. 329; *Brady v. Hennion*, 8 Bosw. 528; *State v. Stringfellow*, 2 Kansas, 263; *Seabury v. Field*, 1 McAll. 1. And only upon the legal title: *Buhne v. Chism*, 48 Cal. 467. And upon his title as it was when the suit was commenced: *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195. A subsequently acquired deed will not aid him: 25 Ill. 537; 1 Black, U. S. 459; 35 Ill. 265; 13 Ill. 251. For exceptions to the maxim that the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's, see *Macklot v. Dubrueil*, 9 Mo. 473. This rule has no application to mining claims: *Richardson v. McNulty*, 24 Cal. 339. The plaintiff must show title in himself before the ouster laid in the complaint: *Buxton v. Carter*, 11 Mo. 481. A legal subsisting title outstanding in another is inconsistent with the title in the plaintiff, and must defeat him: See *Puterbaugh's Pl. and Pr. (Ill.)*; citing 23 Ill. 75; 25 Ill. 277.

59. Title and Prior Possession.—Where a party relies on documentary title and prior possession, if he fail in the former he may still rely upon the latter. The failure to prove the paper title does not impair the just force and effect of the possession: *Morton v. Folger*, 15 Cal. 275.

60. Title, Allegation of.—The title of the plaintiff is the ultimate fact, the fact in issue upon which the recovery must be had in ejectment: *Marshall v. Shafter*, 32 Cal. 176; *Payne v. Treadwell*, 16 Cal. 243. And must be alleged in the complaint: *Gray v. James*, Pet. C. Ct. 476. It may be averred in general terms, but if he attempts to set forth a specific deraignment, he must aver every fact required to be proved in order to recover: *Castro v. Richardson*, 18 Cal. 478. And he will be confined in the proof to his plead-

ing: *Eagan v. Delaney*, 16 Cal. 85; *Coryell v. Cain*, Id. 567. An allegation that on a day named the plaintiff "was possessed of" certain lands therein described, which said premises the plaintiff claims in fee-simple absolute, is an allegation of title in fee-simple absolute: *Marshall v. Shafter*, 32 Cal. 176. The allegation of possession at the time of the ouster complained of is a sufficient allegation of title: *Hutchinson v. Perley*, 4 Cal. 33; approved in *Winans v. Christy*, Id. 78; *Sacramento V. R. R. v. Moffatt*, 7 Id. 579; *Nagle v. Macy*, 9 Id. 427. So, an averment of prior possession and ouster are sufficient. *Boles v. Cohen*, 15 Cal. 150; *Norris v. Russel*, 5 Cal. 249.

61. Title, Equitable.—Ejectment cannot be maintained upon an equitable title: *O'Connell v. Dougherty*, 32 Cal. 458; *Seaton v. Son*, 32 Cal. 481; *San Felipe M. Co. v. Belshaw*, 49 Id. 655. A mere equitable title to land does not enable the owner to maintain an action to recover possession thereof. Although the Code (N. Y.) has abolished the distinction between actions at law and suits in equity, so far as regards forms, the rules by which the rights of parties are to be determined remain unchanged; and, in an action against a stranger in possession, the plaintiff can only recover on his legal title: 2 T. R. 684; 5 East. 132; 2 Johns. 221; Id. 84; 5 Denio, 225; *Peck v. Newton*, 46 Barb. 173; *Carson v. Boudinot*, 2 Wash. C. Ct. 33; *Hickey v. Stewart*, 3 How. U. S. 750; *Agricult. Bk. of Miss. v. Rice*, 4 Id. 225; *Watkins v. Holman*, 16 Pet. 25. And a legal title will prevail in the absence of a valid equitable defense: *Hartley v. Brown*, 51 Cal. 465.

62. Title Derived through a Firm.—In deriving title through a firm who are not parties, it is not necessary to set out their names: *Cochran v. Scott*, 3 Wend. 229.

63. Title by Sheriff's Deed.—The sheriff is empowered by law to convey by deed to the purchaser, under an execution, all the right, title, interest, and estate of the defendant (4 Scam. 531), as fully as the defendant himself, or an attorney empowered by him for that purpose, could have done. The officer in fact acts as such attorney, appointed for that purpose by law: See *Dodge v. Walley*, 22 Cal. 224; *McDonald v. Badger*, 23 Id. 399; *Lessee of Cooper v. Galbraith*, 3 Wash. C. Ct. 550; *Blood v. Light*, 38 Cal. 649. As to recitals in sheriff's deed, see *Donahue v. McNulty*, 24 Cal. 417; *Hihn v. Peck*, 30 Id. 287. As to title conveyed by such deed, see *Blood v. Light*, 38 Cal. 649, and cases there cited.

64. Title Subsequently Acquired.—A party may have two suits against the same defendant, if the second is brought on a title acquired after the commencement of the first: *Vance v. Olinger*, 27 Cal. 358.

65. Title under Sheriff's Sale.—Where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale, made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover: *Alderson v. Bell*, 9 Cal. 315; *Kellogg v. Kellogg*, 6 Barb. 116; *Brewster v. Striker*, 1 E. D. Smith, 321; *Townshend v. Wesson*, 4 Duer, 342; and see *Farmers' Bank of Saratoga County v. Merchant*, 13 How. Pr. 10. The plaintiff having a sheriff's title need not show that the defendant in execution had title, but only that he was in possession at the time of the sale: *Hartley v. Ferrell*, 9 Fla. 374, citing 10 Ga. 74. He need only show a judgment, execution, and a sheriff's deed: *Sinclair v. Worthy*, 1 Wins. (N. C.) No. 1, 114.

66. Two Titles.—Where one enters generally under two titles, the law adjudges that he entered under the better title of the two: *Gardner v. Sharp*, 4 Wash. C. Ct. 609.

67. United States Courts.—The petitory action in the United States courts corresponds with the action of ejectment in the state courts: 7 How. U. S. 846; 9 Pet. 632; *Gilmer v. Poindexter*, 10 How. U. S. 257.

68. Value.—Where the value of the matter in dispute is not averred in the complaint, evidence cannot be given of it by the defendant: *Lanning v. Dolph*, 4 Wash. C. Ct. 624. *Contra*, when the pleadings do not state the value of the property in controversy, the value may be shown at the trial: *Beard v. Federy*, 3 Wall. U. S. 488.

69. Vendor of Land.—When a vendor elects to rescind the contract of sale for non-compliance of its terms, he may bring ejectment against the purchaser: *Dean v. Comstock*, 32 Ill. 173. Where a party acquires possession of land under an executory contract of purchase, the vendor cannot maintain ejectment until after notice to quit, or demand of possession: 14 Ill. 91; 32 Id. 173. And after the purchaser has perfected his title to the lands in pursuance of the contract, an action will not lie against him by a grantee of the sheriff, under a judgment against the devisee of the vendor: *Smith v. Gage*, 41 Barb. 60. But where he enters holding a bond for a deed of the usual form, and fails to comply with the terms of the purchase, the vendor may rescind the contract and maintain ejectment: 32 Ill. 173.

70. Vermont.—For cause of action, a party who would avail himself of the bar of the Statute of Limitations, must show that there had been an actual ouster by some person entering into possession adversely to the plaintiff. A mere intruder without title is not protected: *Society for Propagation v. Town of Pawlet*, 4 Pet. 480; *Clarke v. Courtney*, 5 Id. 319.

71. When the Action Lies.—As to when ejectment may be brought against claimants not in possession, see *Harvey v. Tyler*, 2 Wall. 329. Ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession: *Adams on Eject.* 18; 1 Mees. & W. 210; 2 Barn. & Ald. 652; *Child v. Chappel*, 9 N. Y. 246. But it will lie for anything attached to the soil, of which the sheriff can deliver possession: *Saxton v. May*, 16 Johns. 184. So it will lie for a room in a building, although the walls have been taken down, and in form, character, and value, the identity of the premises has been entirely destroyed: *Rowan v. Kelsey*, 2 Keyes, 594. It will lie whenever a right of entry exists. The thing claimed should be a corporeal hereditament: *Adams on Eject.* 18. And the interest should be visible and tangible, so that the sheriff may deliver possession to the plaintiff: Id.; 18 Barb. 484; *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Id. 484.

72. When Action may be Maintained.—The rule that the claimant in ejectment must recover upon the strength of his own title, is in this state (California) so far modified that a plaintiff may recover upon proof of a possession prior to that of the defendants, notwithstanding the real title is in a stranger: *Hubbard v. Barry*, 21 Cal. 321; approved in *Richardson v. McNulty*, 24 Cal. 348; *Harris v. McGregor*, 29 Cal. 129; *Southmayd v. Henley*, 45 Cal. 101. On a title to land by estoppel, ejectment may be maintained: *Stoddard v. Chambers*, 2 How. U. S. 284. Or under a grant accompanied by possession!

Boyreau v. Campbell, 1 McAll. 119. Or under United States patent: *Ballance v. Forsyth*, 13 How. U. S. 18. In Pennsylvania, a warrant accompanied by payment of the purchase money and a legal survey, entitles the holder to sue in ejectment: 3 Dall. 425; 3 Wash. C. Ct. 81; *Penns v. Klyne*, 1 Wash. C. Ct. 207; *Dubois v. Newman*, 4 Id. 74; *Vanhorn v. Chesnut*, 2 Id. 160; *Copley v. Riddle*, Id. 354.

73. When Action will not Lie.—The sale of lands in the city of San Francisco, by a portion of the board of commissioners of the funded debt, does not pass a title upon which ejectment will lie: *Leonard v. Darlington*, 6 Cal. 123. Nor will a deed of the sheriff, of premises claimed as a homestead, at an execution sale, for the excess of the value of the premises over five thousand dollars: *Gary v. Estabrook*, 6 Cal. 457. Ejectment does not lie to try the right to a road or right of way: *Wood v. Truckee T. Co.* 24 Cal. 474; see note 71; see Adams on Eject. 18 *et seq.* The holder or assignee of a grant issued by a California governor, without approval by the departmental assembly, or juridical possession, cannot in ejectment recover from the conferee of the federal government, having an approved survey: *Estrada v. Murphy*, 19 Cal. 248. A party who has a right of entry upon lands, and who has entered by force or fraud, cannot be turned out of possession by an action of ejectment: *Depuy v. Williams*, 26 Cal. 309.

No. 442.

ii. *Ejectment, where Damages and Rents and Profits are Claimed.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the plaintiff was the owner, and seised in fee and possessed, and entitled to the possession of that certain tract of land situate in the, county of, State of, described as follows, to wit: [description of property.]

II. That while the plaintiff was such owner, and so seised and possessed, and entitled to the possession of said land and premises, the said defendant did, on the day and year aforesaid, without right or title, enter into and upon the same, and oust and eject the plaintiff therefrom, and ever since that day has withheld, and still withholds the possession thereof from the plaintiff, to his damage in the sum of dollars.

III. That the value of the rents and profits of the said land and premises, from the said day of, 187., and while the plaintiff has been excluded therefrom, is dollars.

Wherefore the plaintiff demands judgment against the said defendant.

1. For the restitution of said land and premises.
2. For the sum of dollars damages for the withholding thereof.
3. For dollars, the value of the rents and profits thereof, together with costs of suit.

No. 443.

iii. *The Same—Alleging Title by Descent.*

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B., late of, deceased, was at and before his death seised in fee of [describe premises], and was at the time of his death in possession of the same.

II. That on the day of, 187 , at, said A. B. died intestate, leaving surviving him the plaintiff, his sole heir at law.

III. That on the day of, 187. [etc], the defendant, who was not then and there, or at any time, the executor or administrator of the said A. B., did [allege ouster as in other forms].

[Demand of Judgment.]

NOTE.—See Cal. Code C. P., secs. 1452 and 1453.

74. Allegation Setting forth Title by Devise.—That on the day of, 187., the said A. B. died, having by his last will devised to the plaintiff the said premises, which will has been duly proved as a will of real estate in the probate court of the county of

75. Essential Allegations.—A decedent claimed and exercised acts of ownership over a tract of land for some time before and up to his death. His possession descended to his heirs as tenants in common. One of them, who was also executor of his will, directed to sell the decedent's land, bought the land from a third person claiming to hold a perfect title. In ejectment against him, it was not necessary that a tender of the purchase-money should be made before commencing suit, as defendant claimed in opposition to the trust: *Keller v. Auble*, 58 Penn. 410.

76. Heir of Devisee.—A person in possession of land, without other title, has a devisable interest, and the heir of his devisee can maintain ejectment against one who has entered on the land and cannot show title or possession prior to the testator: *Asher v. Whitlock*, Law. Rep. 1 Q. B. 1. An averment that the defendant's ancestor was in his life-time seised in fee, and in possession of, etc., sufficiently avers the fact of title in him, and a proof of grants to him is admissible under it: *People v. Livingston*, 8 Barb. 253.

77. Title.—The above is a sufficient averment of title of ancestor: *People v. Livingston*, 8 Barb. 253. As to allegation of heirship, see *St. John v. Northrup*, 23 Barb. 25. An allegation in the complaint that plaintiffs are the sons

of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship: *Castro v. Armesti*, 14 Cal. 39. Under the old law in California a devisee could not maintain ejectment until the distribution and close of the estate: *McCrea v. Haraszthy*, 51 Cal. 146. But by Cal. Code C. P. sec. 1452, the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator.

No. 444.

iv. *Alleging Title by Possession.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187 , he was possessed of the [designate property].

II. That while so possessed, the defendant, on the.... day of....., 187., without right or title so to do, entered thereon, and ousted and ejected the plaintiff therefrom, and from thence hitherto has withheld, and still withholds the possession thereof from the plaintiff, to his damage.....dollars.

[Demand of Judgment.]

78. Abandonment.—Laying off land into town lots, selling the same, and exercising other acts of ownership over them, is no evidence of abandonment, but taken in connection with previous acts of ownership furnishes additional evidence of possession: *Plume v. Seward*, 4 Cal. 94. Persons in casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, are not justified in resisting by force others who attempt to land upon it to engage in the same pursuit: *People v. Batchelder*, 27 Cal. 69.

79. Actual Possession.—By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property: *Coryell v. Cain*, 16 Cal. 567. The mere taking from the land a portion of the herbage growing thereon is not sufficient to give a right of possession: *Steinback v. Fitzpatrick*, 12 Cal. 295. A complaint in ejectment averring that plaintiff was in the actual possession of the premises by inclosure and cultivation; that defendant, upon a certain day, entered upon the same, and ousted the plaintiff; and that defendant is still in possession, is sufficient: *Gladwin v. Stebbins*, 2 Cal. 103; *Leigh Co. v. Indep. Ditch Co.*, 8 Id. 323; *Boles v. Weifenback*, 15 Id. 144; *Boles v. Cohen*, Id. 151. The possession need not be by the claimant personally, but possession by a tenant under him inures to his benefit: *Gregg v. Forsyth*, 24 How. U. S. 179; *Gregg v. Tesson*, 1 Black. 150; *Dredge v. Forsyth*, 2 Id. 563. What is actual and what constructive possession in many cases must be a question for the jury: *O'Callaghan v. Booth*, 6 Cal. 63. One

in actual possession may rely on his possession alone until the opposite party shows a better right: *Hawzhurst v. Lander*, 28 Cal. 331. So, one in actual possession cannot be dispossessed by another who has neither title nor color of title: *Suñol v. Hepburn*, 1 Cal. 254. Where land had been cultivated for two years, and was at the time in possession of an agent: *Held*, conclusive evidence of actual possession: *Moore v. Goslin*, 5 Cal. 266. Proof of possession, however short, will entitle a claimant to recover: *Potter v. Knowles*, 5 Cal. 87. So, the use of the property for a series of years without direct proof of the character of the fence, or its efficiency, was held sufficient: *Hestres v. Brannan*, 21 Cal. 423.

80. Form.—For authorities in support of this form, consult *Ensign v. Sherman*, 13 How. Pr. 35; *Warner v. Nelligar*, 12 Id. 402. *Mayor of N. Y. v. Campbell*, 18 Barb. 156.

81. Line of Canal.—The inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights; nor is it necessary as notice to those who have received actual notice of the intended line of the canal: *Conger v. Weaver*, 6 Cal. 548.

82. Occupation.—The word "occupation" may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily the expressions "occupation," "*possessio pedis*," "subjection to the will and control," are employed as synonymous terms, and as signifying actual possession: *Lawrence v. Fulton*, 19 Cal. 683.

83. Possession.—The possession of real property is of two kinds, the one constructive, depending upon the title and the right to the actual possession, and the other subsisting in the actual occupation: *Cahoon v. Marshall*, 25 Cal. 197. A party may be in possession of land without a personal residence thereon, or without having personally cultivated it: *Plume v. Seward*, 4 Cal. 94; *Barstow v. Newman*, 34 Cal. 90. Possession, coupled with color of title, must prevail in ejectment, except where a better title is shown in the defendants: *Winans v. Christy*, 4 Cal. 70.

84. Possession of Part.—The actual possession of a small portion of a large tract, with a claim of title to the whole, will not enable a party to maintain a possessory action under Mexican law, where it appears on the face of the papers that his title is a nullity: *Suñol v. Hepburn*, 1 Cal. 254. Where each of the parties has held possession of distinct parts of the land in controversy, the party having the better right is in constructive possession of all the land not occupied in fact by his adversary: 8 Cranch, 229; *Hunt v. Wickliffe*, 2 Pet. 201; *Barr v. Gratz*, 4 Wheat. 213.

85. Possession, Extent of.—See Cal. Code C. P., secs. 321 to 327. A mere intruder is limited to his actual possession: *Suñol v. Hepburn*, 1 Cal. 254; *Wilson v. Corbier*, 13 Cal. 166; *Watkins v. Holman*, 16 Pet. 25. But one entering land under a deed or title, his possession is co-extensive with his deed or title, with some qualifications, and his possession is not always confined to his actual inclosure: *Castro v. Gill*, 5 Cal. 40; *Green v. Liter*, 8 Cranch, 229; *Barr v. Gratz*, 4 Wheat. 213; *Ellicott v. Pearl*, 10 Pet. 412; affirming S. C., 1 McLean, 206; *Prescott v. Nevers*, 4 Mason, 326. So, where a party takes possession of part of a tract, under a deed of conveyance to the whole, with specific boundaries, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the

deed: *Rose v. Davis*, 11 Cal. 133; *Baldwin v. Simpson*, 12 Cal. 560; *Kile v. Tubbs*, 23 Cal. 431; *Hicks v. Coleman*, 25 Cal. 122; *McKee v. Greene*, 31 Cal. 418; *Ayers v. Bensley*, 32 Cal. 620. This rule is not limited to small tracts of land such as are usually occupied and cultivated for farms: *Hicks v. Coleman*, 25 Cal. 122. And it extends to unrecorded deeds, with respect to those at least who have actual knowledge of the terms of the deed, and the grantee's claim under it: *Roberts v. Unger*, 30 Cal. 676. But if the title includes no definite metes and bounds, possession will not be deemed to extend beyond the actual possession proved: *Fraser v. Hunter*, 5 Cranch C. Ct. 470. And a grantee entering into possession under a deed, thereby acquires no greater possession than his grantee had: *Bird v. Dennison*, 7 Cal. 297.

86. Possession, Insufficient.—Where a party takes possession of land, and incloses it with a fence consisting of posts, seven feet apart, and one board six inches wide nailed on to the posts, and not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed to the whole: *Baldwin v. Simpson*, 12 Cal. 560; see also *Hughes v. Hazard*, 42 Cal. 149.

87. Possessory Act.—A party relying on the Possessory Act of the State, must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual possession, or an actual inclosure of the whole claim: *Coryell v. Cain*, 16 Cal. 567.

88. Mineral Lands.—The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining: *Smith v. Doe*, 15 Cal. 100. In ejectment in such an action, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. Defendants answered denying the possession of plaintiff and the ouster, and averred that the land was public land of the United States, valuable for mining, and that they entered for that purpose. Plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; he could not recover on the pleadings, because the character of his possession did not appear—the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever: *Smith v. Doe*, 15 Cal. 100. Where, in a suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title: *Eagan v. Delaney*, 16 Cal. 87.

89. Mineral Lands, Location on.—One party may locate grounds for fluming purposes, and another party, at the same time, or a different time, may locate the same ground for mining purposes, and the two locations will not conflict: *O'Kieffe v. Cunningham*, 9 Cal. 589.

90. Mining Claims, Appropriation of.—The usual mode of taking up mining claims is to put upon the claim a written notice that the party has

located it, and this may be done personally, or by any one for him; and when done by an agent the title rests in him and the agent cannot subsequently divest it: *Gore v. McBrayer*, 18 Cal. 582. The acts of appropriation are regulated by mining rules and local custom which when not in conflict with the constitution and laws of the State must govern all decisions in an action for mining claims: Cal. Code C. P. sec. 748; see *Hicks v. Bell*, 3 Cal. 219; *Packer v. Heaton*, 9 Cal. 568; *Waring v. Crow*, 11 Cal. 366; *English v. Johnston*, 17 Cal. 107; *Gore v. McBrayer*, 18 Cal. 582; *Prosser v. Parks*, Id. 47; *Colman v. Clements*, 23 Cal. 245; *St. John v. Kild*, 26 Cal. 263; *Morton v. Solambo C. M. Co.*, Id. 527; *T. M. Tunnel Co. v. Stranahan*, 31 Cal. 387.

91. Mining Claims, Constructive Possession.—The entry on a part of a mining claim under a deed does not by the deed alone give possession of the entire claim, unless the deed contains definite and certain boundaries which can be traced out and made known from the deed alone: *Hess v. Winder*, 30 Cal. 349. But when a person enters *bona fide*, under color of title, the possession of part, as against any one but the true owner, is the possession of the whole, as described in the deed or lease: *Attwood v. Fricot*, 17 Cal. 37. When the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the whole: *English v. Johnson*, 17 Cal. 107. But the boundaries must be plainly indicated by marks or monuments: *Hess v. Winder*, 30 Cal. 349. Fencing a mining claim would only serve to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to possession: *Rogers v. Cooney*, 7 Nev. 213. And this rule is equally applicable to claims valuable only for the "tailings" deposited on them from other mines: Id.

92. Mining Claims, Extent of.—In the absence of mining regulations, the fact that a party has located a claim bounded by another raises no implication that the last location corresponds in size or in the direction of its lines with the former: *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40. The quantity of ground a miner may locate for mining purposes may be limited by the mining rules of the district: *Prosser v. Parks*, 18 Cal. 47. And a general custom, whether existing anterior to the location or not, may be given in evidence; but a local rule stands on a different footing, and cannot be introduced to affect the value of a claim acquired previous to its establishment: *T. M. Tunn Co. v. Stranahan*, 20 Cal. 198.

93. Mining Claims, how Held.—A mining claim on the public domain may be held either by actual occupancy and the exercise of control over it, by indicating its boundaries by monuments, or works, or by occupancy in accordance with local mining customs: *Hess v. Winder*, 30 Cal. 349. Where the location is made both by posting notices and by designating fixed objects on or near its exterior boundaries, witness may state whether the location made included the ground in dispute: *Kelly v. Taylor*, 23 Cal. 11. One seeking to hold a mining claim by virtue of prior possession alone, without reference to local mining customs, must mark out his boundaries by such distinct physical marks as will indicate to any one what his exterior boundaries are: *Hess v. Winder*, 30 Cal. 349. But fences are not necessary: *English v. Johnson*, 17 Cal. 107.

94. Mining Claims, Ownership of.—The whole course of legislation and judicial decisions, since the organization of the State, has recognized a quali-

fied ownership of the mines in private individuals: *State of California v. Moore*, 12 Cal. 56. As between themselves and all other persons, except the United States, miners in possession of claims are owners of the same, having a vested right of property founded on possession and appropriation: *Hughes v. Devlin*, 23 Cal. 501.

95. Mining Claim—Possession of.—Mining ground acquired by entry under a claim for mining purposes, the bounds being distinctly defined, accompanied by actual occupancy of a part of the tract, is sufficient possession to maintain ejectment for the entire claim, although the acts of appropriation were not according to any mining rule: *Table M. T. Co. v. Stranahan*, 20 Cal. 198. So, also, the owner of an undivided interest is entitled to the possession of the whole mine as against one who has no title to any portion: *Melton v. Lambard*, 51 Cal. 258. The rule applicable to agricultural lands does not apply: *English v. Johnson*, 17 Cal. 107. A miner is not expected to reside on his claim, or cultivate it, or inclose it, work done outside the claim, in reasonable proximity thereto, having direct relation to the working of the claim, being sufficient: *McGarrity v. Byington*, 12 Cal. 426. As, for example, starting a tunnel a considerable distance off, to run into the claim: *English v. Johnson*, 17 Cal. 107, is sufficient possession. Mining claims are held by possession, regulated and defined by usage and local and conventional rules, and the "actual possession" which is applied to agricultural lands and understood to be a *possessio pedis*, cannot be required in the case of a mining claim: *Attwood v. Fricot*, 17 Cal. 37.

96. Mining Claim, Sale of.—In the early case of *McCarron v. O'Connell*, 7 Cal. 152, it was held that a bill of sale not under seal was insufficient to convey a mining claim; but it has been since held that instruments conveying mining claims need not be under seal: *Draper v. Douglass*, 23 Cal. 347; *St. John v. Kidd*, 26 Cal. 263. And where it is conveyed by bill of sale, the bill of sale is the best evidence of the transfer, parol evidence of the conveyance being inadmissible: *Crary v. Campbell*, 24 Cal. 634. And if the bill of sale be lost or destroyed, its loss or destruction must be proved to lay the foundation for secondary evidence, as to its contents: *King v. Randlett*, 33 Cal. 318.

97. Mining Claims, Verbal Sale of.—Where the grantor is in actual possession of a mining claim, he may convey the same by a verbal sale, accompanied by a transfer of the possession: *Gatewood v. McLaughlin*, 23 Cal. 178; *Antoine Co. v. Ridge Co.*, Id. 219; *Copper Hill Min. Co. v. Spencer* (No. 2), 25 Cal. 18; *Patterson v. Keystone Min. Co.*, 23 Cal. 575. This was before the Act of 1860, but since the Act of 1860, p. 175, all sales of mining claims must be in writing: See *Patterson v. Keystone Mining Co.*, 30 Cal. 360, where the question of the sufficiency of a verbal sale under the act is discussed. In *Goller v. Fett*, 30 Cal. 481, it was held that a verbal sale, even if accompanied by delivery of possession, does not pass the legal title; see, also, Cal. Civ. Code, sec. 1091; and *Melton v. Lambard*, 51 Cal. 258.

98. Mining Regulations.—The mining regulations of a district are devised for the purpose of enabling persons who locate claims to hold them by constructive possession, and they are not to be construed as authorizing a person to invade the actual possession of another, on the pretext that the latter has neglected to perform the requisite amount of work, or has failed in some other respect to comply with such regulations; and the language, "open and

subject to appropriation under the local usages of the district," does not necessarily imply that a mining claim in the actual possession of a person may be re-located by another person on his failure to perform the acts required by the mining regulations of the district: *Bradley v. Lee*, 38 Cal. 367.

No. 445.

v. The Same—Alleging Prior Possession.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187., he was lawfully possessed, as owner in fee-simple, of that certain tract of land, situate in the county of....., State of....., described as follows: [describe property.]

II. That the plaintiff being so possessed, the defendant, afterwards, on the day of, 187., entered into the possession of the demanded premises, and ousted the plaintiff, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of dollars.

III. That the value of the rents, issues and profits of the said premises, from the said day of, 187., and while the plaintiff has been excluded therefrom by the defendant, is dollars.

[Demand of Judgment.]

99. Actual Possession.—The plaintiff who claims to recover on the ground of prior possession alone, without color of title, must show an actual prior possession; and if he shows that he had the land protected by a substantial inclosure, even if he had not improved or lived on it, this constitutes an actual possession: *Polack v. McGrath*, 32 Cal. 15.

100. Compliance with Statute.—Where a plaintiff seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in this state, he can only recover upon proof of actual *bona fide* occupation: *Murphy v. Wallingford*, 6 Cal. 648.

101. Entry upon Lands.—One who enters upon a tract of land where there is no adverse possession, a portion of which is uninclosed, claiming the whole under a deed describing the entire tract, will prevail in an action against one who enters subsequently upon the uninclosed part, showing color of title merely: *Hicks v. Coleman*, 25 Cal. 122.

102. Form.—As to form in ejectment, see *Payne v. Treadwell*, 16 Cal. 220. Other authorities in support: *Walter v. Lockwood*, 23 Barb. 228; S. C., 4 Abb. Pr. 307; *People v. Mayor of N. Y.*, 28 Barb. 240; S. C., 8 Abb. Pr. 7; *Ensign v. Sherman*, 14 How. Pr. 439; *Caperton v. Schmidt*, 26 Cal. 479.

103. Presumption.—Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor:

Potter v. Knowles, 5 Cal. 87. And where title to land rests in possession only, the prior possessor has the better title: *Ayres v. Bensley*, 32 Cal. 620.

104. Prior Possession.—Prior possession will prevail in ejectment over a subsequent one, obtained by mere entry, without any lawful right: *Buckner v. Chambliss*, 30 Ga. 652. A locator on public land, who shows that he first entered upon it, marked out the boundaries, and diligently proceeded to, or diligently made preparation to do such acts as were necessary to constitute an actual possession, will be entitled, even without showing an actual possession, to recover against a person subsequently entering: *Staininger v. Andrews*, 4 Nev. Rep. 59. Where the plaintiff has documentary title, aided and accompanied by possession, and the defendant is a mere trespasser, the plaintiff is entitled to recover on prior peaceable possession alone: *Grady v. Early*, 18 Cal. 108; see, also, *Donahue v. Gallavan*, 43 Id. 473. Possession is *prima facie* evidence of title: *Hutchinson v. Perley*, 4 Cal. 33; *Hicks v. Davis*, Id. 67; *Winans v. Christy*, Id. 70; *Bequette v. Caulfield*, Id. 278.

105. Prior Claim to Water.—Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows: *Kimball v. Gearhart*, 12 Cal. 27.

106. Prior Possession of Grantor.—If one who has not been in the actual possession of land claims title on the ground of prior possession, he must not only show the conveyances of his grantors, but must show that they were in actual possession and occupation of the land: *Borel v. Rollins*, 30 Cal. 408; *Lawrence v. Fulton*, 19 Cal. 683.

107. Title by Prior Possession.—Actions of ejectment do not affect the title to the property, but the possession: *Long v. Neville*, 29 Cal. 131; but see *Marshall v. Shafter*, 32 Cal. 194. It is confined to cases where the claimant has a possessory title, or a right of entry upon the lands: *Payne v. Treadwell*, 5 Cal. 310. The right to possession, as between the parties, is tried, and this right to the possession is title: *Marshall v. Shafter*, 32 Cal. 194. An action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute, as against the defendant; but this refers to proceedings in equity: *Ortman v. Dixon*, 13 Cal. 33. In ejectment, plaintiffs may rely on prior possession, and the legal title is not necessarily involved: *Grady v. Early*, 18 Cal. 108. It is sufficient evidence of title to support the action: *Nagle v. Macy*, 9 Cal. 426. Title, therefore, by prior possession may be alleged, but he must, in connection therewith, allege an entry and ouster: *Norris v. Russel*, 5 Cal. 249; *Boles v. Cohen*, 15 Cal. 150; *Payne v. Treadwell*, 16 Cal. 220. And a continued adverse holding by the defendant: *Boles v. Cohen*, 15 Cal. 150; *Garrison v. Sampson*, Id. 93; *Steinback v. Fitzpatrick*, 12 Cal. 295.

108. Title by Limitation.—Adverse possession for five years gives a title to the land: *Le Roy v. Rogers*, 30 Cal. 229; *Simpson v. Eckstein*, 22 Cal. 580. But possession for five years, unless it is either admitted or found as a fact to be adverse, will not presume a title: *Sharp v. Daugney*, 33 Cal. 505; *Stillman v. White Rock Manf. Co.*, 3 Woodb. & M. 538. In Illinois, a person in actual possession under claim or color of title in good faith for seven years, and during all that time paying all taxes, shall be adjudged legal

owner: *Russel v. Barney*, 6 McLean, 577; compare *Wright v. Mattison*, 18 How. U. S. 50. When parties enter without title or claim, or color of title, such occupation is subservient to the paramount title, as title must be somewhere: *Sharp v. Daugney*, 33 Cal. 505; *Harvey v. Tyler*, 2 Wall. U. S. 328. As to the rule in Connecticut, see *Stillman v. White Rock Manf. Co.*, 3 Woodb. & M. 538. In Delaware, an action of ejectment cannot be maintained against a mere trespasser on the ground of possession alone, unless the possession has continued twenty years: *Jefferson v. Howell*, 1 Houst. 178. For the statutes of limitation of the various states, see Adams on Eject. p. 43 *et seq.* And in California, see Code C. P., secs. 315 to 328.

No. 446.

vi. *By the Tenant.*

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. is the owner in fee-simple of a piece of land in the Township of....., County of....., bounded as follows [describe the land]:

II. That on the.....day of....., 187., the said A. B. let the said premises to plaintiff, for....years, from....

III. That the defendant withholds the possession thereof from the plaintiff.

[Demand of Judgment.]

109. Action Will not Lie.—In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad: *Connor v. Brady*, 1 How. U. S. 211.

110. Expired Lease.—Where the lease under which ejectment is brought has expired before trial, no recovery can be had without amendment: *Roe v. Doe*, 30 Ga. 608. Land was conveyed in fee, reserving a rent charge with a right of re-entry for non-payment. The grantor died, leaving six heirs: *Held*, that one of said heirs could maintain ejectment for one sixth of said lands for non-payment of rent, without joining the others: *Cruger v. McClaughry*, 51 Barb. 642.

111. Personal Representatives.—The personal representatives of a lessee for years, or his assignee, have an estate in the land, and are entitled to its possession, and may maintain ejectment: *Williams on Ex.* 748; 3 T. R. 13; *Roscoe on Actions*, 545; 16 Eng. Com. L. R. 115; *Mosher v. Yost*, 33 Barb. 277. A plaintiff in ejectment cannot recover when one lessor under whom he claims has conveyed his legal and equitable title to the other, and the right of that other lessor is barred by a former recovery: *Dearmond v. Roe*, 30 Ga. 632.

112. Possession by Tenant.—A party entering under a lease with bounds, or under a deed, gains a possession only to the extent of the boundaries of the lease or deed. Where the tenant is settled on a patent with intent to gain possession, without limits or bounds, it was held that the landlord's possession thereby obtained extended to the lines of the patent: *Lee v.*

McDaniel, 1 A. K. Marshall, 234; *Owings v. Gibson*, 2 Id. 515. But an alienee entering upon lands with bounds gains a possession only to the extent of his bounds: *Maury v. Waugh*, 1 A. K. Marshall, 452; *Owings v. Gibson*, 2 Id. 515; *Jones v. Chiles*, 2 Dana, 25; *Wickliffe v. Ensor*, 9 B. Monr. 258. If the landlord himself enters and is ousted by an intruder, he may recover to the boundaries of his deed, while the tenant, if ousted, can recover only to the boundaries of his lease: *Walsh v. Hill*, 38 Cal. 481.

No. 447.

vii. *Form in Ejectment under the Oregon Code.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is [and for five years last past has continually been] the owner in fee of the parcel of land situated in said county, known and described as lot, in block, in the city of, in said county and state, and is entitled to the possession thereof.

II. That said defendant wrongfully withholds [and for one year and three months last past has continued wrongfully to withhold] the same from him, said plaintiff, to the said plaintiff's damage in the sum of dollars.

[Demand of Judgment.]

113. Oregon.—The Practice Act of Oregon specially directs the substance of the complaint in actions for the “recovery of the possession of real property.” Oregon General Laws, compilation 1872, sec. 315, is as follows: “The plaintiff, in his complaint, shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage, such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had.” But plaintiff should not set out his muniments of title: *Pease v. Hannah*, 3 Or. 301. Where, however, defendant set up an undivided interest in himself he was required to specify what such interest was: Id. The donee of a land claim may maintain an action under the statute for the recovery of real property, at least against one who shows no title except possession: *Keith v. Cheeney*, 1 Or. 285; see, also, *Dolph v. Barney*, 5 Id. 191. A deed unacknowledged and unrecorded is good between the parties: *Moore v. Thomas*, 1 Or. 201. And a recorded conveyance of real estate not vitiated by fraud, will have priority in all cases over a conveyance not recorded: Id. An executor has not such an estate as will authorize him to maintain an action under sec. 313, Or. Code: *Humphreys v. Taylor*, 5 Or. 260.

No. 448.

viii. *Form Under the New York Code—By Widow, for Dower.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the late A. B. was husband of the plaintiff at the time of his death; that he died many years since; and that at the time of his death, and for many years previous thereto, he was seised in fee and in possession of the following described premises [description].

II. That the plaintiff is entitled to one undivided third part thereof for her life, as her reasonable dower.

III. That the defendant Y. Z. is in possession of said premises, and wrongfully and unjustly withholds from plaintiff the possession of her said one third part thereof as her dower.

IV. That the other defendants claim an estate in fee in said premises, as the heirs at law of the said A. B.; that they are the legitimate children of said A. B.

Wherefore the plaintiff demands judgment.

1. That she recover possession of one undivided third part of said premises for her own life, against said defendant Y. Z.

2. That she be declared entitled to one undivided third part thereof for her own life against all the other defendants.

3. That she recover her costs of action.

NOTE.—This form is applicable to the State of New York, but not to this State, and is taken from Abbott's Forms, No. 624.

COMPLAINTS—SUBDIVISION SEVENTH.

In Actions Concerning Real Property.

CHAPTER I.

FORECLOSURE OF MORTGAGES AND LIENS.

No. 449.

i. Foreclosure of Mortgage—Common Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at....., in this State, the defendant made his promissory note, bearing date on that day, in the words and figures following, to wit: [Copy of note.]

II. That the said defendant, to secure the payment of the said principal sum and the interest thereon, as mentioned in said note, according to the tenor thereof, did execute under his hand and seal, and deliver to the said plaintiff, a certain mortgage, bearing date the day of, 187., and conditioned for the payment of the said sum of dollars, and interest thereon at the rate and at the time and in the manner specified in said note, and according to the conditions thereof; which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to wit, on the day of, 187., duly recorded in the Office of the County Recorder of the County of, in Liber of Mortgages, page; a copy of which said mortgage, with the indorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III. That the interest on the said principal sum mentioned in said promissory note, and in the said mortgage, has been paid down to the....day of....., 187., but nothing more has been paid thereon; and the principal sum mentioned in said promissory note and mortgage, together with interest thereon at the rate of....per cent.

per., from the day of, 187 . . ., has not been paid by said defendant.

IV. That the plaintiff, on the day of, 187 . . ., or thereabouts, paid on said premises the sum of dollars, for taxes duly assessed thereon, which were a lien and incumbrance upon said premises legally attaching thereto; and the said sum of dollars, taxes so paid by the plaintiff, and interest thereon at the rate of per cent. per, from the day of, 187 . . ., has not been paid by the defendant to the plaintiff.

V. That the plaintiff is now the lawful owner of said promissory note and mortgage.

VI. That the defendants [here insert names of other claimants and incumbrancers] have, or claim to have, some interest or claim upon said premises, or some part thereof [as purchasers, mortgagees, judgment-creditors, or otherwise], which interests or claims are subsequent to and subject to the lien of the plaintiff's mortgage.

Wherefore the plaintiff prays judgment against the said defendant:

1. For the sum of dollars, with interest at the rate of per cent. per, from the day of, 187 . . ., and for costs of suit.

2. That the usual decree may be made for the sale of said premises by the sheriff of said county, according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff, and that said defendant and all persons claiming under him, subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises, and every part thereof, and that the said plaintiff may have judgment and execution against the said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

3. That the plaintiff or any other party to the suit may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's

deed therefor; and that the plaintiff may have such other or further relief in the premises as to this court may seem meet and equitable.

1. Action.—In California, there shall be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real estate or personal property: Cal. Code C. P., sec. 726. It is an action for the legal determination of the existence of the lien, ascertainment of its extent, and subjection to sale of the estate pledged for its satisfaction: *Boggs v. Hargrave*, 16 Cal. 559; *McMillan v. Richards*, 9 Id. 365. The proceeding for a foreclosure of the equity of redemption as at common law, is unknown to our system: *Goodenow v. Ewer*, 16 Cal. 461; *McMillan v. Richards*, 9 Id. 365. The owner of the mortgage can in no case become the owner of the premises, except by purchase upon sale under judicial decree, consummated by conveyance: Id. The surplus after a decree of sale going to the subsequent incumbrancers or the owner of the premises: Id. And adverse titles to the premises are not the proper subjects for determination in the suit: *San Francisco v. Lawton*, 18 Cal. 465. In such cases the decree should reserve the right of the adverse claimants, and so limit the relief awarded as to protect those rights: *San Francisco v. Lawton*, 21 Cal. 589; *Elias v. Verdugo*, 27 Id. 418; see, also, *Ord v. McKee*, 5 Id. 515.

2. Action—When it will lie.—A mortgagee is not prevented from foreclosing his mortgage in a state court by the fact that the mortgagor has been declared a bankrupt in the U. S. district court, and the mortgagee has proved his debt therein; but he must obtain leave from the U. S. district court to bring his action in the state court: *Société d'Epargnes v. McHenry*, 49 Cal. 351. A state district court has jurisdiction to foreclose a mortgage on real estate which lies outside of the judicial district: Id. As to when it will lie against the estate of a deceased person: See Code C. P., sec. 1500.

3. Account, Taking of.—The best method is to appoint the proper officer of the court to report the amount due, and then exceptions may be filed; though the calculations may be made by the court; though in that case, a mistake in calculation must be brought to his notice in some form, analogous to an exception to a master's report: *Guy v. Franklin*, 5 Cal. 417; see Code C. P., sec. 638 and following.

4. Allegation of Insurance by Plaintiff.—That the defendant [mortgagor] did not keep the premises insured, but on the contrary [suffered the insurance to expire on the....day of.....]; in consequence whereof the plaintiff caused them to be insured in the.....Company, of....., for the term of....., from the....day of....., 187., and paid therefor the premium of.....dollars.

5. Apportioning Debt.—If several persons become, subsequently to the mortgage, entitled to separate portions of the whole tract mortgaged, the debt will not be apportioned on their several parts: *Perre v. Castro*, 14 Cal. 531. In such case the part of the property still owned by the mortgagor will be first sold; and if that is insufficient to satisfy the decree, the other parts will be subjected in the inverse order in which they were sold by the mortgagor to the several owners: See *Cheever v. Fair*, 5 Id. 337; 1 Story Eq. 223.

6. Assignment of the Land.—An assignment by the mortgagee of all

his interest in the land, passes nothing unless the debt be assigned, the mortgage being a mere incident to the debt: *Nagle v. Macy*, 9 Cal. 428; *Mack v. Wetzlar*, 39 Id. 247; *Jackson v. Bronson*, 19 John. 325; *Ellison v. Daniels*, 11 N. H. 274. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover possession without foreclosure and sale: Code C. P., sec. 744; Civil Code, sec. 2927.

7. Attorney's Fee.—"In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." Act of March 27, 1874, following sec. 728 of Code C. P. If there is no provision in the mortgage for payment of counsel fees, the plaintiff in an action to foreclose it is not entitled to such fees: *Sichel v. Carrillo*, 42 Cal. 494. A plaintiff who appears in person is not entitled to counsel fees, though stipulated for in the mortgage: *Patterson v. Donner*, 48 Id. 380. In the foreclosure of a mortgage against the property of a deceased person, no counsel fees are allowed unless the claim secured by the mortgage has been first presented to the executor or administrator: Code C. P., sec. 1500.

8. Bond for Title.—At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity rests in the vendee, to have the title in compliance with the conditions; and the legal title and equity go to the whole estate, including fixtures. The vendor can bring an action in ejectment on breach of condition, or foreclose: *Merritt v. Judd*, 14 Cal. 59.

9. Conditions in Mortgage.—The usual conditions in a mortgage contain no personal obligation to pay the money. The contract is simply that the mortgagor may pay the sum named, which will revest the title in him, or if he fail to do it then the deed becomes absolute at law, though in equity he still has a right to redeem, which right may be cut off by a foreclosure. In such cases the mortgagee is limited to the land for payment, and if that is not sufficient he has no further security: *Drummond v. Richards*, 2 Munf. 337; 4 Kent's Com. 136; 2 West. Law Jour. 216; Nash's Ohio Pl. & Pr. 347.

10. Claims against Estate.—The words "claimant" and "claim" are synonymous with the words "creditor" and "legal demand:" *Gray v. Palmer*, 9 Cal. 616. The word "claims" does not embrace mortgage liens, but has reference only to such debts or demands against decedent as might have been enforced against him in his life-time by personal actions, for the recovery of money and upon which only a money judgment could have been rendered: *Fallon v. Butler*, 21 Cal. 24. The word "claim," when it speaks of claims against an estate, is broad enough to include a mortgage: *Ellis v. Polhemus*, 27 Cal. 350. Or a note secured by a mortgage: Id.

11. Conflicting Claims.—The purchaser in good faith and for value of a mortgage, should not have his rights prejudiced or postponed by a controversy between purchasers of the mortgaged premises, concerning the order in which different portions of the premises covered by the mortgage shall be sold under the foreclosure. He is entitled to judgment for foreclosure and sale, without reference to the conflicting claims of owners of the estate: *Smart v. Bement*; 3 Keyes, 241.

12. Debt Falling Due by Installments.—If the debt be not all due, so soon as sufficient property is sold to pay the debt due the sale shall cease, and the court may order more sold as soon as more of the debt falls due: Cal.

Code C. P., sec. 728. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, with a proper rebatement of interest: *Id.* When a debt secured is payable in installments, the mortgagee or his assignee has a right to bring an action to foreclose the mortgage, when the first installment falls due and is not paid: *Grattan v. Wiggins*, 23 Cal. 16. This is also the practice in Ohio: *King v. Longworth*, 7 Ohio, 585; *Lansing v. Capron*, 1 John. Ch. 617; *Lyman v. Sale*, 2 Id. 487. A mortgage given to secure a debt payable by installments may be foreclosed on failure to pay the first installment when due. The bill in such case may set out the amounts not yet due, and if they become due and are not paid before the final hearing, they may be included in the decree: *Magruder v. Eggleston*, 41 Miss. 284.

13. Defeasance.—The difference between an absolute deed and a mortgage consists in the defeasance which is an essential part of the latter. Whatever may be the effect of a parol defeasance in equity, it is clear that it cannot at law operate as a defeasance of a deed of conveyance: *Flagg v. Mann*, 14 Pick. 467; *Scituate v. Hanover*, 16 Id. 222; *Flint v. Sheldon*, 13 Mass. 443; *Eaton v. Green*, 22 Pick. 526; 1 Wash. Real Prop. 480; see Civil Code, sec. 2925. In a bill in equity that avers a deed to have been a mortgage, it is not necessary to add that it became so by a defeasance, in order to let in proof of a defeasance: *Bently v. Phelps*, 2 Woodb. & M. 403. Where A. gave to B. a deed of bargain and sale absolute on its face, and as a part of the same transaction, B. executed and delivered to A. an instrument in writing, in which he stated that the land had been deeded to him as security for the payment of a promissory note, and the instrument recited that moneys received from the sales of the land should be credited on said note, and that when the note was fully paid by the proceeds from the sales of the land, or otherwise, that B. should re-deed to A. all the lands first deeded to him, excepting such as may be sold, such a transaction is not intended as a mortgage merely. The instrument relied on as a defeasance amounts to a declaration of trust, and shows the intention to vest the title in B. to enable him to sell and convey the lands: *Vance v. Lincoln*, 38 Cal. 586. To convert a deed, absolute in form, into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise the intention appearing on the face of the deed will prevail: *Henley v. Hotaling*, 41 Id. 22. The test is, whether, notwithstanding the conveyance, there is a subsisting continuing debt from the grantor to the grantee: *Farmer v. Grose*, 42 Id. 169. If it is given as a security for an indebtedness, a court of equity will declare it to be a mortgage, and allow the grantor to redeem, both as against the original grantee and parties who purchase from him with knowledge: *Kuhn v. Rumpp*, 46 Id. 299.

14. Demand and Notice.—Against a subsequent purchaser the complaint should allege that the mortgage was recorded, or that defendant had notice when he purchased: *Peru Bridge Co. v. Hendricks*, 18 Ind. 11. But no demand is necessary where a mortgage is payable generally: *Gillett v. Balcom*, 6 Barb. 370; *Harris v. Mulock*, 9 How. Pr. 402. The English practice seems to be different: Whitw. Eq. Prec. 395, Note 7. Nor is guarantor or surety entitled to notice before commencing suit: *Rushmore v. Miller*, 4 Edw. Ch. 84; Civil Code, sec. 2807.

15. Description of Land.—Section fifty-eight of the Practice Act (Cal.

Code C. P., sec. 456), relating to the description of land, does not apply to actions for the foreclosure of mortgages: *Emeric v. Tams*, 6 Cal. 155. In Indiana, the mortgage, etc., must be made part of the complaint: *Hiatt v. Goblt*, 18 Ind. (Kerr.) 494. But in California it is sufficient that the complaint refer to a copy of the mortgage annexed, for a description of the land: *Emeric v. Tams*, 6 Cal. 155.

16. Equity Practice.—Under the former procedure, if proceedings had been had, the complaint should show that the remedy at law had been exhausted, and with what effect: *Shufelt v. Shufelt*, 9 Paige, 137; *Lovett v. German Reformed Church*, 12 Barb. 67; but proceedings at law were not necessarily a bar to the foreclosure: *Williamson v. Champlin*, 8 Paige, 70; *Suydam v. Bartle*, 9 Id. 294. But the practice is different now; if there have been any proceedings, they are to be set up in defense: *Newton v. Newton*, 12 Ind. 527.

17. Enforcement of Mortgage against a part only of the lands mortgaged is a waiver of the mortgage lien as to the remainder; but such waiver will not prevent the docketing of a judgment for any unsatisfied balance of the decree under sec. 726 of the Code C. P.: *Mascarel v. Raffour*, 51 Cal. 242.

18. Essential Averment.—The complaint should state that the debt was due at the time the action was commenced: *Hare v. Van Deusen*, 32 Barb. 92; *Smith v. Holmes*, 19 N.Y. 271; *McCullough v. Colby*, 4 Bos. 603; *Watson v. Thibou*, 17 Abb. Pr. 184.

19. Estate of Deceased Partner.—An action to foreclose a mortgage made by a deceased partner on his separate estate, may be maintained without showing in the complaint that the firm is insolvent, or that mortgagee has pursued his remedy upon the debt against the surviving partner: *Savings and Loan Society v. Gibb*, 21 Cal. 595. In such case, if the surviving partner be executor of deceased, and also claims an interest in the mortgaged property as devisee, he may be, as an individual, made co-defendant with himself as executor: *Id.*

20. Executors as Parties Defendant.—An action may be maintained against an executor or administrator to foreclose a mortgage upon real estate, executed by his testator or intestate, although the debt secured by the mortgage has been presented and allowed: *Fallon v. Butler*, 21 Cal. 24.

21. Infant Defendants.—If there are infant defendants, the complaint must state what their interest is, and whether it is paramount or subordinate to the interest mortgaged: *Aldrich v. Lapham*, 6 How. Pr. 129.

22. Injunction.—The court may, on good cause shown, restrain the party in possession of the mortgaged premises from committing injury to the same during foreclosure: Cal. Code C. P., sec. 745. The remedy in such case is only preventive, and not exclusive of any other remedy: *Sands v. Pfeiffer*, 10 Cal. 258.

23. Insurance.—As to insurance effected by mortgagor in his own name, assignment thereof to the mortgagee, etc., see Civil Code, secs. 2541, 2542.

24. Interest, Averment of.—In an action to foreclose a mortgage, an allegation that a party who is made a co-defendant with the mortgagor, has or claims to have some interest in or claim upon the mortgaged premises, is

sufficient, without averring the character of the interest: *Anthony v. Nye*, 30 Cal. 401. A general allegation in the complaint that such parties have or claim to have some interest in the property is all that is required: *Poett v. Stearns*, 28 Cal. 226.

25. Lien of Bondholder.—The lien of a bondholder who has lent money to a state, on the pledge of certain property by its legislature, cannot be divested or postponed by a subsequent act of such legislature: *Trustees of Wabash and Erie Canal Co. v. Beers*, 2 Black, U. S. 448. Such bondholder is protected by the clause of the constitution of the United States, which forbids a state to pass a law impairing the obligation of contracts: *Id.* The bondholder does not lose the lien of his first bonds by surrendering or exchanging others of later date and of inferior security for canal stock or other state pledges: *Id.* A suit could be maintained upon the coupons, without production of the bonds to which they had been attached: *Commissioners of Knox County v. Aspinwall*, 21 How. U. S. 539. A coupon payable to bearer, cut from a bond and owned by one party, while another party owns the bond, is still a lien under a mortgage given to secure the bond, and entitles the holder to share *pro rata* in the proceeds of said mortgage on foreclosure: *Miller v. Rutland and W. R. R. Co.*, 40 Vt. 399; *Arents v. Commonwealth*, 18 Grat. (Va.) 750.

26. Material Rights.—The action for a foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the sheriff's deed, but to subject to sale the title which the mortgagor had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess the title, but only a temporary right to the possession: *Burton v. Lies*, 21 Cal. 87.

27. Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession: Civ. Code, sec. 2920. It may be created upon property held adversely to the mortgagor: *Id.* sec. 2921. A mortgage can be created, renewed, or extended, only by writing executed with the formalities required in the case of a grant of real property: *Id.* sec. 2922. It is a lien upon everything which would pass by a grant of the property: *Id.* sec. 2926. It is not a personal obligation: *Id.* sec. 2928. And the assignment of a debt secured by a mortgage carries with it the security: *Id.* sec. 2936.

28. Mortgage a mere Security.—A mortgage is a mere security for the payment of money or the performance of some other act, the interest passing to the mortgagee being regarded as a lien upon the real estate. They pass no interest or estate in the land except the lien, and the lien is an incident to the debt or the obligation which is thereby secured: *McMillan v. Richards*, 9 Cal. 409. The definition of a mortgage as known at common law; an estate defeasible by the performance of a condition subsequent, does not correctly describe that instrument as it is interpreted in this and most of the other states: *Jackson v. Lodge*, 36 Cal. 28. This doctrine is sustained by a decided preponderance of authority: *Coles v. Coles*, 15 Johns. 319; *Lane v. Shears*, 1 Wend. 433. And is established in this state by statute: Cal. Code C. P., sec. 744. That a deed absolute on its face may be proved to have been intended only as a mortgage is settled in this state: *Vance v. Lincoln*, 38 Cal. 586. But an absolute deed, although shown by parol evidence to

have been intended as a mortgage, conveys the legal title: *Hughes v. Davis*, 40 Id. 117.

29. Parties.—All persons interested in the mortgaged premises should be made parties, otherwise they will be entitled to redeem, even though the sale was made on the oldest lien: *Nash's Pl. and Pr.* 346; see vol. i, "Parties," pp. 71 and 95 to 98. So, an assignee is entitled to foreclose, but the mortgagee is still a proper party; but if the assignment has been absolute, conveying the entire interest in the mortgage, he is no longer a necessary party: *Newman v. Chapman*, 2 Rand. 92; *McGuffey v. Finley*, 20 Ohio, 474. Where the mortgagor has by deed conveyed his equity to another he need not be a party: *Bigelow v. Bush*, 6 Paige Ch. 343. A subsequent purchaser of land mortgaged is a proper, if not a necessary, party to a foreclosure suit, and if the complaint be faulty in praying to hold him as trustee on account of fraud in the purchase, such defect cannot be reached by demurrer: *De Leon v. Higuera*, 15 Cal. 495.

30. Parties Supplemental.—If the real holders of the title are not parties to the decree of foreclosure, a court of equity will allow them to be made such by a supplemental complaint, provided application be made within a reasonable time: *Heyman v. Lowell*, 23 Cal. 106. It is only such as have an interest in and under the mortgagor that are necessary parties. The suit is to extinguish his title: *Eagle Fi. Co. v. Lent*, 6 Paige Ch. 635. The action may be maintained by one who is surety for the mortgage debt to compel payment or foreclosure: *Marsh v. Pike*, 10 Paige, 595; *Lawrence v. Lawrence*, 3 Barb. Ch. 71; *Cornell v. Prescott*, 2 Barb. 16; *Vanderkemp v. Shelton*, 11 Paige, 28.

31. Parol Evidence.—Parol evidence is admissible at law, as well as in equity, to show that a deed, absolute on its face, was given as a security for money, and is in fact a mortgage: *Jackson v. Lodge*, 36 Cal. 28; *Vance v. Lincoln*, 38 Id. 586.

32. Power of Sale in Mortgage.—Where a mortgage contains a power of sale, the mortgagee has his election to foreclose in chancery or to sell under the power: *Cormerais v. Genella*, 22 Cal. 116. Or the mortgagee, with the consent of the mortgagor, may be authorized to sell the premises to pay the debt: *Fogarty v. Sawyer*, 17 Cal. 589. The legal title passes by the sale of the mortgaged premises, but where the mortgagee becomes the purchaser indirectly by having the premises bid off for him, the sale is voidable on application in equity by the mortgagor: *Blockley v. Fowler*, 21 Cal. 326. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a deed of the same, upon default of paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial sale: *Koch v. Briggs*, 14 Cal. 256; see, also, Civil Code, sec. 858.

33. Receiver.—The plaintiff has no right to have a receiver of rents and profits appointed during litigation: *Guy v. Ide*, 6 Cal. 99. The Code of Civil Procedure provides that when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insuffi-

cient to discharge the mortgage debt, a receiver may be appointed in an action to foreclose: Sec. 564, subd. 2.

34. Record and Acknowledgment.—As against the mortgagor, the allegation of record and acknowledgment is immaterial and unnecessary; or that the mortgagor has not conveyed: *St. Mark's Fire Ins. Co. v. Harria*, 13 How. Pr. 95. Except in case of a married woman: *Perdue v. Aldridge*, 19 Ind. (Kerr.) 290; *Culph v. Phillips*, 17 Id. 209.

35. Relief in Case of Default.—In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill: *Raun v. Reynolds*, 11 Cal. 14; see, also, Code C. P., sec. 580.

36. Sale under Statute Foreclosure.—Where the agent employed by the mortgagee to sell property, sold it at a time contrary to instructions given him, and for something less than its value: *Held*, that the purchaser having bought in good faith without knowledge of the instructions, the courts should not set aside the sale. An attorney acting in such transaction might be treated as acting in his professional character, except where third persons are thus affected: *Leet v. McMaster*, 51 Barb. 236. A notice of sale on a statutory foreclosure need not specify that the mortgage will be foreclosed: *Id.*

37. Remedy—Extent of.—The party on a bill to foreclose a mortgage is confined in his remedy to the pledge. Such a suit is not intended to act *in personam*. It seems to be pretty generally admitted that the mortgagee may proceed at law on his bond or covenant at the same time that he is prosecuting his mortgage in chancery; and that after foreclosure he may sue at law for the deficiency: *Id.* *Redesdale*, 1 Sch. and Lefr. 176; *Aylett v. Hill*, Dickens, 551; *Took's case*, *Id.* 785; *Perry v. Barker*, 13 Ves. jr. 198; *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317. In California, however, judgment may be rendered for the amount found due upon the personal obligation to secure which the mortgage is executed: *Rollins v. Forbes*, 10 Cal. 299; *Rowland v. Leiby*, 14 Id. 156; *Englund v. Lewis*, 25 Id. 337. Parties are at liberty to adopt the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and after sale apply for the ascertainment of any deficiency and for execution for the same, or they may take a formal judgment for the amount due in the first instance: *Rowland v. Leiby*, 14 Cal. 156; *Roe v. Tab. M. Wat. Co.*, 10 Id. 441; *Hobbs v. Duff*, 23 Id. 624. But the lien does not attach until after a sale, and deficiency reported, even though the judgment is docketed when first rendered: *Hibberd v. Smith*, 50 Id. 511; Code C. P., sec. 726.

38. Right of Surety by Mortgage.—Where property was mortgaged by a surety to secure the payment of notes of his principal, and the mortgage expressly provided that the surety should not be personally liable, and the surety took another mortgage from his principal to indemnify himself: *Held*, that the holders of the notes might subject premises mortgaged by the surety to the payment of the notes, or might abandon the mortgage and subject the property of the principal in the hands of the surety to the payment of the notes, or they might have the property mortgaged to secure the notes sold, the proceeds applied to their satisfaction, and if any balance remained unpaid, subject the surplus of any property of the principal in the hands of the

surety, that might remain after compensating the surety for loss or damage by the appropriation of his property mortgaged; but they are not entitled to appropriate both the property mortgaged by the surety, and that conveyed or mortgaged by the principal to the surety for the indemnity of the latter: *Van Orden v. Durham*, 35 Cal. 136.

39. Separate Debts Secured by one Mortgage. — Where separate debts of several persons are secured by one mortgage, either creditor may bring suit to foreclose, but other parties interested must be brought in: *Taylor v. Yreka Water Co.*, 14 Cal. 212.

40. Severance from Realty. — The severance and removal of a house from land covered by a mortgage withdraws the house from the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use: *Buckout v. Swift*, 27 Cal. 434; see, also, *Hill v. Gwin*, 51 Id. 47. In the former case the house was removed by a flood; in the latter case fixtures were removed by authority of the mortgagee before foreclosure, and although the mortgagee became the purchaser it was held that the mortgagor could recover the value of the fixtures so removed.

41. Statute of Limitations, California. — In California, an action upon any contract, obligation, or liability founded upon an instrument in writing executed in that state is barred in four years; if executed out of the state, in two years: Code C. P., secs. 337 and 339. Where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage; and although he may pursue distinct remedies upon the note and mortgage, the limitation prescribed is the same in both cases: *Lord v. Morris*, 18 Cal. 482. The mortgage is as much within the general designation of a contract, obligation or liability founded upon an instrument in writing, as is the note itself: Id.; see, also, *Low v. Allen*, 26 Id. 142; *Sichel v. Carrillo*, 42 Id. 493. The statute may be pleaded by one who holds a mortgage upon the same land, executed after the note secured by the first mortgage became barred: *Sichel v. Carrillo*, *supra*; or by the grantee of the mortgagor: *McCarthy v. White*, 21 Id. 495. In other states a different rule prevails by force of different statutes of limitation, though resting upon the same principle, viz.: that the note and mortgage are affected by the statute independently of each other, and hence where a longer period is prescribed for a mortgage than for the note secured, the remedy upon the mortgage will continue notwithstanding the note may be barred; and where the limitation is the same, the bar, though separate, will occur at the same time: See *Sichel v. Carrillo*, *supra*, and cases there cited. Thus, in Georgia, a promissory note is barred in six years, and a mortgage in twenty; but the note being barred will not prevent an action to foreclose the mortgage: *Elkins v. Edwards*, 8 Ga. 326; see, also, *Thayer v. Mann*, 19 Pick. 535; *Joy v. Adams*, 26 Maine, 333.

42. Statute of Limitation—Renewal. — In *Lent v. Morrill*, 25 Cal. 492, It was held that a renewal of a note, secured by a mortgage upon lands, so as to extend the time within which it would be barred by the statute of limitations, carries with it an extension of the lien of the mortgage to the time when the note will expire by the terms of the renewal, if at the time the note is renewed the maker of the note, being also the mortgagor, is still the owner of the lands mortgaged. The correctness of this ruling might be

open to question upon principle, upon the theory adopted in the cases cited in the preceding note, namely, that the statute operates upon these obligations separately; that they give distinct remedies to the creditor, which may be separately enforced; that the one is a personal obligation, while the other creates no personal obligation, but a lien on specific property; that a debtor may be willing to renew his personal obligation, and not willing to renew a lien on his property; and that a willingness to do the latter cannot be inferred from the former, any more than the making of the note originally, *per se*, created a mortgage. It is true that the mortgage is an incident to the debt, but it is not a necessary incident, and, though frequent, it is not even a usual one. It is created by a separate act, with certain formalities which are not required in making a promissory note. The civil code, however, seems to have settled the question. It provides: "A mortgage can be created, renewed or extended, only by writing, executed with the formalities required in the case of a grant of real property:" Sec. 2922.

43. Statute of Limitations—Estates.—The statute requiring claims against an estate to be presented to the executor or administrator for allowance within a specified time, is practically a statute of limitations. A mortgage upon the lands of decedent is a claim within the meaning of this statute, and must be presented for allowance: *Ellis v. Polhemus*, 27 Cal. 350; *Pitte v. Shipley*, 46 Id. 160. This is certainly true when there is no note or other obligation aside from the mortgage. It seems that the presentation of a note secured by mortgage is sufficient to sustain the mortgage: *Fallon v. Butler*, 21 Id. 32. Where a note, executed by one person, is secured by a mortgage executed by another, it is not necessary to present the note for allowance to the executor or administrator of the maker of the note, but the mortgage may be enforced, notwithstanding the claim against the estate is barred: *Sichel v. Carrillo*, 42 Id. 493. So, it is not necessary to present the note, though the mortgage was given by the decedent, if he afterwards conveyed the lands to another: *Christy v. Dana*, 42 Id. 174.

44. Stipulations in Mortgage.—In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees, not exceeding five per cent. of the amount due, it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause of action, but, like costs, a mere incident to it, and might be fixed by the court, at its discretion, not exceeding the five per cent.: *Carriere v. Minturn*, 5 Cal. 435; *Gronfier v. Minturn*, 5 Id. 492; and see *ante*, note 7.

45. Subsequent Incumbrancers.—If there are incumbrancers which the plaintiff insists are subsequent to his mortgage, but who claim to have a prior equity, *e. g.*, where the plaintiff claims to have become mortgagee in good faith, without notice of a prior claim, the facts must be specially stated: *Potter v. Crandall*, Clarke Ch. 119; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316.

46. Subsequent Liens.—It seems it is not necessary to make a claim for payment of subsequent liens: *Field v. Hawxhurst*, 9 How. Pr. 75. See, as to former practice in this regard, *Wheeler v. Van Kuren*, 1 Barb. Ch. 490; *Tower v. White*, 10 Paige, 395.

47. Subsequent Mortgages.—Where the sheriff was proceeding to sell under a judgment in a case of foreclosure, and the plaintiff, as subsequent

mortgagee, tendered to him the full amount of the judgment and costs, which was refused, and where plaintiff paid into court the amount tendered, but not enough to cover the interest accrued subsequent to the tender, and plaintiff asked to be subrogated to their right as subsequent mortgagees, it was held that all the relief to which the plaintiff is entitled could have been speedily and summarily had in the action of foreclosure on motion, and a subsequent equitable action will not lie: *Ketchum v. Crippin*, 37 Cal. 223.

48. Substituted Parties.—Where the plaintiff, being the owner of an undivided one half of a tract of land, mortgaged his interest therein to A., and subsequently, with his co-tenant, conveyed the land to B. and C., two thirds to one and one third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due, the plaintiff filed his bill against B. and C. to compel a foreclosure and payment: *Held*, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action: *Abell v. Coon*, 7 Cal. 105. A mere stranger who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and in the absence of fraud, accident, or mistake of fact, have the mortgage re-instated, and himself substituted in the place of the mortgagee: *Guy v. Du Uprey*, 16 Cal. 196.

49. Surplus Averment.—If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant (thereby making it by averment a legal mortgage), and also sets out a copy of the same, and it appears on its face not to be a legal as distinguished from an equitable mortgage, the averment may be rejected as surplusage: *Love v. S. N. L. W. & M. Co.*, 32 Cal. 639. As to variance between pleadings and the mortgage, see *Sears v. Barnum*, Clarke's Ch. 139.

50. Tax Title.—In an action to foreclose a tax title, it is unnecessary to allege in the petition the due and regular performance of the acts, necessary to make the tax deed valid, when the execution and delivery of such deed by the proper officer is averred, and a copy of it is annexed: *Byington v. Robertson*, 17 Iowa, 562.

51. Tender.—Where upon default in the payment of interest upon a mortgage, which provides that on such default the principal shall, at the mortgagee's option, become payable, the mortgagee has made his election by bringing an action claiming to foreclose for the whole amount, the defendant has a right, although after suit brought, to tender the whole amount with costs, and the tender, if refused, extinguishes the lien of the mortgage: 1 Rob. 246; *Hartley v. Tatham*, 1 Keyes, 222.

52. That Defendants Claim some Interest.—The above allegation is sufficient against defendants who claim subsequent to the plaintiff's mortgage. It is only important in a contest as to the surplus: *Lewis v. Smith*, 9 N. Y. 502; *Drury v. Clark*, 16 How. Pr. 424. But a decree against such defendants does not bar rights which are paramount to the title of both mortgagor and mortgagee: *Lewis v. Smith*, 9 N. Y. 502; 11 Barb. 152.

53. Two Mortgages on the same Property.—Where plaintiff holds two mortgages on the same property, and the property is indivisible, he may foreclose when the first becomes due: *Hawkins v. Hill*, 15 Cal. 499.

54. Waiver of Right to Foreclose.—A. commenced an action against B. on a money demand, and to foreclose a mortgage given to secure his debt. On motion of A.'s attorney, the prayer for foreclosure of the mortgage and sale of the property was stricken out, and a money judgment taken: *Held*, that this was an abandonment and waiver of A.'s right to a foreclosure and sale of the mortgaged property: *Ladd v. Ruggles*, 23 Cal. 232.

55. When Action Lies.—Where a judgment is rendered against A. and his sureties, and A. and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B., a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released: *Held*, that no action can be maintained on the mortgage; for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied: *People v. Chisholm*, 8 Cal. 29; 42 Ind. 310.

56. Who may Maintain Action.—The creditor of the estate of a deceased person whose claim is secured by mortgage, may, after presentation of his claim, proceed at once to foreclose the mortgage, whether it be allowed or rejected: *Willis v. Farley*, 24 Cal. 490. But the claim must first be presented to the executor, or administrator, and the probate judge: *Id.*

No. 450.

ii. *The Same—Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187..., the defendant executed to the plaintiff a note, conditioned to pay him dollars, in years, with interest at [twelve] per cent. per annum, payable [half yearly].

II. That for securing the payment of the said note, the said executed to the plaintiff a mortgage of the same date, upon certain real property in the County of, described as follows: [give a description of the property, as it should be described in the sheriff's deed.]

III. That on the day of, 187., the said mortgage was recorded in the office of the County Recorder of the County of, in Book, of Mortgages, page

IV. That on the day of, 187., the said conveyed the same real property, subject to the said mortgage, to the defendant, E. F., who thereupon covenanted with the said A. B., under his hand and seal, that the said note and mortgage should be paid at maturity.

V. That no part of the principal or interest of the said note and mortgage has been paid.

VI. That the defendant G. H. has or claims some interest in, or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage.

Wherefore, the plaintiff demands judgment:

1. That each of the defendants, and all persons claiming under any of them, subsequently to the commencement of this action, be foreclosed of all equity of redemption or other interest in the said real property.

2. That the same may be sold, and the proceeds applied to the payment of the amount due on the said note and mortgage, with interest.

3. That if there be any deficiency, the defendants A. B. and E. F. pay the same.

NOTE.—This form is from Swan's Pl. 414.

57. Essential Averments.—In an action upon the promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient: *Shafer v. Bear River and Auburn W. and M. Co.*, 4 Cal. 294. And an action will not lie on the mere recital in a mortgage of the existence of the debt: *Id.* Though it has been held that the indebtedness for which the mortgage was given need not be set forth: *Day v. Perkins*, 2 Sandf. Ch. 359. The averment in the complaint that the plaintiff is the owner of the note and mortgage is sufficient, without stating that he is holder: *Rollins v. Forbes*, 10 Cal. 299. A complaint in an action commenced after the death of the husband, on a note and mortgage executed by the husband and wife, during the life of the husband, does not state a cause of action, unless it aver that the husband in his life-time failed to pay the note: *Brown v. Orr*, 29 Cal. 120.

58. Joinder of Causes of Action.—It is not an improper joinder of two causes of action to sue the indorser of a promissory note on his liability as such, and to ask a decree against the mortgagor foreclosing a mortgage, given to secure the same note by another party: *Eastman v. Turman*, 24 Cal. 382; but see *Sands v. Wood*, 1 Clarke (La.), 263. Claim against mortgagor and mortgagee and persons having liens may be united: *Farwell v. Jackson*, 28 Cal. 105. Mortgage and debt may be united. Where a suit was brought to foreclose a mortgage executed by husband and wife to secure a note made by the husband alone, and the complaint prayed for judgment against the husband for the amount of the note and interest, and a decree against both defendants for the sale of the mortgaged premises: *Held*, there was no misjoinder of actions, and the complaint was not demurrable on that ground: *Rollins v. Forbes*, 10 Cal. 299.

59. Parties.—The cause of action against the mortgagor on the mortgage, in such case, might be prosecuted to judgment, without making the maker of the notes a party: *Sichel v. Carrillo*, 42 Cal. 493. Where certain parties executed notes and a mortgage to secure their payment to certain individuals of their number, suit may be brought for the foreclosure of the mortgage, notwithstanding the plaintiffs in the suit are both payors and payees, mortgagors and mortgagees: *McDowell v. Jacobs*, 10 Cal. 387. The right of the plaintiff

to go into equity, and foreclose a mortgage given to secure a note, depends upon the fact whether he was really interested in the subject matter: *Ord v. McKee*, 5 Cal. 515. A note was executed to O., as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with M., was entitled to one half of the note: *Held*, that O., having a right to the note, had a right to foreclose the mortgage: *Id.* It seems that on foreclosure of a subsequent mortgage, a prior mortgage cannot be adjudged to be discharged without consent of the prior mortgagee: *McReynolds v. Munns*, 2 Keyes, 215.

60. Several Notes.—Where several notes have been given which are secured by one mortgage, and the notes are assigned to different persons, the assignor has a right, by agreement with the assignees, to fix the rights of the purchasers of the several notes to the mortgage security: *Grattan v. Wiggins*, 23 Cal. 16. Where, in such a case, the assignee of a note, having the first right to the benefit of the mortgaged security, forecloses when the debt falls due, and obtains a decree under which all the mortgaged property is sold, such foreclosure and sale operate as an extinguishment of the mortgage: *Id.* The holders of the other notes secured by the mortgage have a right to redeem from the sale made under such foreclosure; but when not made parties to the action, must assert this right to redeem within four years, or it is barred by the statute of limitations: *Id.*

No. 451.

iii. *Assignee of Mortgagee Guaranteeing Payment, against Mortgagor, Grantee Assuming Payment, and Junior Incumbrancers.*

[TITLE]

The plaintiff complains, and alleges:

I. and II. [As in Form No. 449, substituting mortgagee's name for the words "the plaintiff."]

III. That on the.....day of....., 187., the defendant [mortgagee], by an instrument in writing under his hand and seal, assigned said note and mortgage to plaintiff, which assignment contained a covenant, of which the following is a copy: [set it forth.]

IV. That on theday of....., 187., the defendants, A. B. and C. D., entered into an indenture under their hands and seals, whereby the said A. B. conveyed to said C. D. the mortgaged premises, subject to said mortgage, and said C. D. covenanted that he would pay off and discharge the same as a part of the consideration of said conveyance [or otherwise, according to the covenant].

V. That no proceedings have been had, at law or otherwise, for the recovery of said moneys, or any part thereof.

VI. [Where plaintiff holds other liens.] That on theday of....., 187., at....., in the court of....., the plaintiff recovered a judgment, which was duly given

by said court against the defendant [designate which], fordollars, in an action wherein this plaintiff was plaintiff [or defendant], and the said defendant herein was defendant [or plaintiff]; and which was on the.....day of....., 187., duly docketed in the office of the clerk of said county, so as to become, and still remains, a lien on the mortgaged premises.

VII. That the defendants [subsequent incumbrancers] have or claim some interest in, or claim upon said premises, or some part thereof, accrued since the lien of said mortgage.

Wherefore the plaintiff demands judgment:

1. That each of the defendants, and all persons claiming under them, or either of them, subsequent to the execution of said mortgage upon said premises, may be foreclosed of all right, claim, or equity of redemption, or other interest in said mortgaged premises, and every part thereof.

2. That the same be sold, and the proceeds applied to the payment of the costs and expenses of this action, and the amount due on said bond and mortgage, and the amount of said premium of insurance [and of said judgment], with interest on said moneys up to the time of such payment.

3. That the defendant [mortgagor] may be adjudged to pay any deficiency that may remain after applying all of said moneys so applicable thereto.

NOTE.—This form is from Abbotts' Forms, No. 681.

61. **Assignees.**—Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants: *Hunter v. Levan*, 11 Cal. 11. If a mortgage is assigned by the mortgagee to another party, as a pledge for the payment of a debt due the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or incumbrances upon the mortgaged property, and make them all parties: *Farwell v. Jackson*, 28 Cal. 105.

62. **Averment.**—In a foreclosure action, the complaint alleged that the mortgage was executed and delivered to one P.; that he was since deceased, and that his wife, having been qualified as his executrix, had duly assigned the

same to the plaintiff; that it was owned and held by him by virtue of the assignment. The answer denied that the mortgage was owned by the plaintiff by virtue of the assignment, or that he was the lawful owner of it. On the trial the plaintiff produced a mortgage in which the mortgagee was named as "P., acting administrator of the estate of D.:" *Held*, that evidence on behalf of defendants to show that the mortgage was taken to secure a debt due to the estate of "D.," and therefore that the executrix had no title to it, was admissible: *Renaud v. Conselyea*, 7 Abb. Pr. 105; reversing S. C., 5 Abb. Pr. 346.

No. 452.

i. *For Redemption of Real Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., he executed to the defendant a mortgage upon certain real property in the city of, in the county of, described as follows [describe it], to secure the payment of dollars in years, with interest at per cent. per annum, payable [half yearly].

II. That on the....day of....., 187., he tendered to the defendant.....dollars, being the principal of the said mortgage, with interest from the date thereof to that time, and requested the defendant to acknowledge satisfaction for the same, but he refused to do so.

Wherefore the plaintiff demands judgment;

1. That he be allowed to redeem the said mortgage, upon paying to the defendant the amount due thereon.

2. That upon such payment the defendant satisfy the said mortgage of record, that plaintiff recover his costs herein, and for other and further proper relief.

63. Action to Redeem.—A subsequent party in interest, whether by way of mortgage, lease, or judgment, cannot on motion obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected: *Douglas v. Woodworth*, 51 Barb. 79. Although a power of sale mortgage authorizes the mortgagee or his assignee to become the purchaser at the sale, yet if he fails in the utmost diligence in protecting the rights of the mortgagor, the mortgagor will be allowed to redeem: *Montague v. Dawes*, 14 All. 369; see *Hahn v. Pindell*, 3 Bush, 189, 193.

64. Adverse Claimants.—For the form of a complaint to ascertain and declare the rights of adverse claimants to real property, to allow redemption from a mortgage, to restrain foreclosure of a mortgage, and for the appointment of new trustees under a trust deed, to fill the place of trustees who had renounced, see *Woodgate v. Fleet*, 9 Abb. Pr. 222.

65. Tender.—The plaintiff, in an action to redeem a mortgage, need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of the action: *Daubenspeck v. Platt*, 22 Cal. 330.

No. 453.

ii. *By a Lessee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant [mortgagor] being the owner in fee of the following described premises, leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of said lease the plaintiff entered upon, and ever since has been, and still is in possession of said premises, and is vested with the unexpired term thereof; which premises are described as follows: [description.]

II. That on the day of, 187., said [mortgagor] made to the defendant [mortgagee] a mortgage upon the same premises to secure dollars, payable on the day of, 187..

III. That on the said last named day the mortgage became due, but has not been paid; and that said [mortgagee] has commenced an action to foreclose the same for such default.

IV. That on the day of, 187., the plaintiff tendered dollars to said [mortgagee], being the amount due on said mortgage, with interest, and the costs of said action [or proceeding] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused so to do.

Wherefore the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant [mortgagee] the amount due upon the mortgage; and that, upon such payment, the defendant, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff.

66. Accounting and Redemption.—In a bill for an accounting and redemption, a distinct offer to pay the amount due is not necessary. The form is, that, on the payment of what, if anything, shall be found due, the mortgagee may be decreed to deliver possession, etc.: *Quin v. Britain*, Hoffm. 353; and see *Barton v. May*, 3 Sandf. Ch. 450.

67. Form.—The above form is from Abbott's Forms, No. 686.

*No. 454.**i. Mechanics' Liens—Common Form—Contractor against Owner.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ... day of, 187., plaintiff and defendant entered into an agreement in writing, whereby the plaintiff agreed to furnish the material and erect for the defendant a certain building upon the lands hereinafter described, and the defendant agreed to pay him therefor the sum of dollars upon the completion thereof, a copy of which said agreement is hereto attached and made part of this complaint. And the plaintiff avers that he completed said building, under said contract, on the day of, 187., and that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendant has not paid the said sum of dollars, mentioned in said agreement, nor any part thereof.

II. That the lands upon which said building was so erected under said contract, are described as follows, to wit: [insert such description as would be proper in a mortgage]. And he avers that the whole thereof is required for the convenient use and occupation of said building.

III. That at the date of said contract, the defendant was the owner, and reputed owner, of the lands hereinbefore described; and ever since has been, and now is the owner and reputed owner of said land and the said building so erected thereon.

IV. That the plaintiff began to furnish material for said building and to perform labor thereon, under said contract, on the day of, 187., and that all the said materials were furnished and the said building erected between that day and the day of, 187., on which last-named day said building was completed.

V. That on the day of, 187., the plaintiff, for the purpose of securing and perfecting a lien for the moneys so due him as aforesaid, under said contract, upon the building and lands hereinbefore described, under the provisions of chapter II. of title IV. of the Code of Civil Procedure of the State of California, filed for record in

the office of the recorder of the said county of, his claim thereof, duly verified by him, a copy of which is hereto attached, marked exhibit "B," and made part of this complaint; and which said claim was thereafter, on the same day, duly recorded in said office, in a book kept therein for that purpose, to wit, in book of liens, at page

VI. That plaintiff paid for verifying and recording said lien the sum of dollars.

VII. That dollars is a reasonable attorney's fee to be allowed to the plaintiff in this action.

Wherefore the plaintiff prays judgment against the defendant for the sum of dollars, remaining unpaid for said labor and materials, and for costs of suit, including dollars, paid for verifying and recording said lien, and dollars, as attorney's fee herein; that said sum of dollars, and the costs herein, be adjudged a lien upon the lands and premises hereinbefore described; that said lands and premises may be sold under the order and decree of this court, and the proceeds thereof be applied to the payment of the costs of this suit and the sum so found due to the plaintiff, and that he have execution for any deficiency, and for other and further proper relief.

.,
Attorney for Plaintiff.

[Verification.]

68. Action and Proceedings.—The provisions of the Cal. Code C. P. are applicable to, and constitute the rules of practice in these actions, except as otherwise provided in the chapter relating to mechanics' liens: see sec. 1198. New trials and appeals are also governed by the Code C. P., with the same exception: *Id.*, sec. 1199.

69. Alteration in Building.—Changing the form or structure of a building, or its alteration to adapt it to other than its original uses, brings it within the statute: *Donahue v. Cromartie*, 21 Cal. 86.

70. Constitutionality.—The general features of the present law were held constitutional in *Hicks v. Murray*, 43 Cal. 521, and *Quale v. Moon*, 48 *Id.* 478.

71. Credits and Offsets.—The words "payments and offsets" are substantially equivalent to the words "credits and offsets:" *Preston v. Sonora Lodge*, 39 Cal. 119.

72. Complaint by Sub-Contractor.—In New York, where the proceeding is by a sub-contractor, his complaint must aver that the labor or materials were furnished in conformity with the contract between the owner and the

original contractor: *Boderick v. Poillon*, 2 E. D. Smith, 554; *Quinn v. Mayor*, etc. of N. Y., 2 E. D. Smith, 558; see, also, *Cunningham v. Jones*, 4 Abb. Pr. 433; *Doughty v. Devlin*, 1 E. D. Smith, 625; *Kennedy v. Paine*, Id. 651; *Cronk v. Whittaker*, Id. 647; *Hauptman v. Halsey*, Id. 668. The complaint must show that the claimant has taken the requisite steps to create a lien: *Foster v. Poillon*, 2 E. D. Smith, 556; *Cronkright v. Thomson*, 1 Id. 661.

73. Construction of Averment.—The reasonable construction of an allegation in a complaint, that “plaintiff furnished the material between the sixth day of April, 1862, and the twenty-eighth day of June, 1862,” is, that the plaintiff commenced furnishing the materials on the sixth day of April, and continued furnishing the same from time to time up to June 28th: *McCrea v. Craig*, 23 Cal. 522.

74. Description of Premises.—For description of premises in real action, see Cal. Code C. P., sec. 456, and cases; see, also, note 15 *ante*. It is sufficient if it describes the premises sufficiently to enable the sheriff to determine beyond a doubt the premises to be sold; and the street number of the premises should be shown, or the plaintiff’s ignorance of it averred: *Duffy v. McManus*, 3 E. D. Smith, 657; S. C., 4 Abb. Pr. 432. The employees of the contractor have no lien on the building as principals: *Dore v. Sellers*, 27 Cal. 588. The following notice of a mechanics’ lien does not contain such a description of the premises as the statute contemplates: “A dwelling-house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the City of San Francisco, on Lot No. . . .” The fact that Conner owned no other building on that street would not cure the defect: *Montrose v. Conner*, 8 Cal. 344. But see *Springer v. Keyser*, 6 Wharton, 187; *Harker v. Conrad*, 12 Sergt. & Rawle, 301; *Tibbetts v. Moore*, 23 Cal. 212.

75. Form.—The above form is drawn under the California statutes.

76. Interest of Third Parties.—The rights and interests of third parties, purchasers and incumbrancers, prior to the suit, are affected only in a similar degree as upon a foreclosure of a mortgage: *Whitney v. Higgins*, 10 Cal. 547. But see Cal. Code C. P., sec. 1186.

77. Jurisdiction.—The proceeding to enforce a mechanic’s lien under the California law of 1861 is a special case, and county courts have jurisdiction: *McNiel v. Borland*, 23 Cal. 144. Otherwise, under Cal. Code C. P., district courts now have exclusive jurisdiction.

78. Labor.—Services rendered in cooking for the men employed in constructing a building are not performed on the building, and are not within the provisions of the statute: *McCormick v. Los Angeles W. Co.*, 40 Cal. 187.

79. Lien—Nature of.—A mechanic’s lien is in the nature of a mortgage, is a charge on the land and mere incident to the debt, and will not pass except by an assignment of the debt: *Ritter v. Stevenson*, 7 Cal. 389.

80. Limitation.—If the time has expired for the enforcement of the lien, the plaintiff is not entitled to a judgment: *Green v. Jackson Water Co.*, 10 Cal. 374; see Code C. P., sec. 1190.

81. Material-Men.—In a suit by a material-man to enforce a lien against a building for lumber sold to the contractor, it must be averred and proved that the lumber was expressly furnished for the building in question, and it

is not sufficient to show that it was used in such building: *Bottomly v. Grace Church*, 2 Cal. 90.

82. Materials.—Liens for materials and for labor are on the same footing: *Moxley v. Shepard*, 3 Cal. 64. The complaint must show not only that the materials were used in the construction of the building, but that they were furnished under an express contract for that particular building on which the lien is claimed: *Bottomly v. Grace Church*, 2 Cal. 91; *Houghton v. Blake*, 5 Id. 240. Materials are furnished when they are delivered, or are ready for delivery at the place agreed upon by the contract: *Tibbetts v. Moore*, 23 Id. 214. One who loans money to pay for material and labor has no lien: *Godefroy v. Caldwell*, 2 Id. 491. Materials furnished are exempt from execution or attachment except for the purchase-money: Code C. P., sec. 1196.

83. Name of Person.—The name of the person by whom the claimant was employed, or to whom he furnished the material, must be stated: Code C. P., sec. 1187; *Wood v. Wrede*, 46 Cal. 637.

84. Notice of Terms of Contract.—If sub-contractors, material-men, or laborers furnish material or labor in the construction of a building or work, relying upon their right of lien under the statutes as security for their pay, they must be held to know the terms to which the right is subordinate, and upon which lien can be secured, and to a strict compliance with these terms: *Henley v. Wadsworth*, 38 Cal. 356. All such persons are presumed to have notice of the contract, a knowledge of its terms, and of the rights and obligations of the parties thereto: Id.

85. Parties Intervening.—Persons having a lien by mortgage upon the property have no right to intervene: *Van Winkle v. Stowe*, 23 Cal. 457. An intervention within six months is as much a compliance with the act as an original suit: *Mars v. McKay*, 14 Cal. 127. But where the suit has been pending some time, and the application to intervene was made just as plaintiff was taking judgment, it was properly refused: *Hocker v. Kelley*, 14 Cal. 164.

86. Parties Plaintiff.—Material-men and mechanics entitled to a lien on a building, but whose claims are several, without any community of interest in the claims themselves, may join as plaintiffs in an equitable action to establish and enforce their liens: *Barber v. Reynolds*, 33 Cal. 497; see, also, Cal. Code C. P., sec. 1195.

87. Personal Actions.—Nothing in the provisions of this chapter shall impair or affect the right of any person to maintain a personal action to recover the debt secured: Cal. Code C. P., sec. 1197.

88. Priority of Liens.—Where different liens are asserted against any property, the court, in the judgment, must declare the rank of each lien, or class of liens, which shall be; First. All persons other than the original contractors and sub-contractors; Second. The sub-contractors; Third. The original contractors. The proceeds of sale must be applied in the same order, and a judgment for any deficiency may be docketed as in case of the foreclosure of a mortgage: Code C. P., sec. 1194. A mechanic's lien is preferred to a mortgage made after the commencement of the work: *Crowell v. Gilmore*, 13 Cal. 56; *Soule v. Dawes*, 7 Id. 576. The lien accrues at the commencement of the work, or the beginning to furnish the materials: *McCrea v. Craig*, 23 Cal. 525. The lien of a judgment, rendered after labor is commenced or material is first delivered, is postponed to the lien of the material-man or

laborer, although the labor is completed, and the last of the material delivered after the judgment is docketed: *Barber v. Reynolds*, 44 Id. 520; Code C. P., sec. 1186.

89. Right of Lien.—Unless some one or some portion of the several payments to be made to the contractor during the progress of the building, were made to the original contractor by the employer before they became due by the terms of the original contract, or after notice had been duly served upon the employer by the holder of a claim against the contractor, the claimant has no right of lien upon the premises, and no legal personal claim against the employer: *Henley v. Wadsworth*, 38 Cal. 360. If the owner of a building which is being erected makes payments to the contractor in good faith, before receiving notice that a material-man claims a lien for material furnished the contractor, such material-man cannot enforce his lien, except for the balance, if any, due the contractor on the contract: *Wells v. Cahn*, 51 Id. 423. The amendments to the Code C. P., concerning liens of mechanics and material-men, adopted in 1874, have not changed the above rule: Id.

90. Relative Rights of Parties.—Upon a compliance on their part with the terms of the statute, the right of a sub-contractor, laborer, or material-man to the lien, which through the original contractor inures primarily to the benefit of persons in that relation, must be determined and controlled by the terms of the original contract between the owner and original contractor: *Henley v. Wadsworth*, 38 Cal. 356; citing *Murdoch v. Stillwell*, 36 Cal. 293.

91. Statement of Demand.—It has been held unnecessary to set out the items of the account: *Brennan v. Swasey*, 16 Cal. 140; *Selden v. Meeks*, 17 Id. 131. A statement will not be rejected because it was filed for too much, unless it appears that it was a willfully false claim: *Barber v. Reynolds*, 44 Id. 520. The statute must be strictly pursued: *Wood v. Wrede*, 46 Id. 638; but a mere mistake in a word will not vitiate a claim: *McDonald v. Backus*, 45 Id. 262.

92. Verification.—If the claimant sign the verification, he need not sign the claim: *Hicks v. Murray*, 43 Cal. 521.

93. Subsequent Statute Governs.—Where the contract was made and the materials furnished while the California lien law of 1858 was in force, but notice of lien was not filed until after the lien law of 1862 went into effect, the lien must be enforced according to the provisions of the latter act: *McCrea v. Craig*, 23 Cal. 522.

No. 455.

ii. *By Sub-Contractor, against Owner and Contractor, for Labor and Materials.*
[TITLE.]

The said plaintiff complains of the defendants and alleges:

I. That the defendant, A. B., is the owner and reputed owner of the following described land and premises situated in county, state of California, to wit: [describe the land] and was such owner and reputed owner at all the times hereinafter mentioned.

II. That on the day of, 187., the defendant, C. D., entered into a contract with said A. B. whereby

he agreed to provide all the materials and labor and erect for said A. B. a certain building, to wit: a dwelling-house, upon the land above described, and for which said A. B. agreed to pay said C. D. the sum of dollars, at the times and in the manner following, to wit: [state amount of payments, and when to be made.]

III. That said C. D. commenced the work of erecting said dwelling-house on said land pursuant to said contract, on the day of, 187., and fully completed the same under and according to the terms of his said contract, on the day of, 187., and otherwise performed and fulfilled all the terms and conditions of said contract so far as the same were to be performed by him; and plaintiff avers that there remains unpaid from the defendant A. B. to the defendant C. D., upon and for the erection of said building under said contract, the sum ofdollars, which said sum became due and payable on the day of, 187..

IV. That on day of, 187., the plaintiff entered into a contract with the defendant C. D., in and by which the plaintiff agreed to furnish the necessary and proper materials for painting said dwelling-house and to paint the same, and the defendant agreed to pay him the sum of dollars therefor upon the completion of the painting thereof; and the plaintiff avers that on the day of, 187., he furnished said materials, and painted said dwelling-house under and in pursuance of said contract, and completed the same on the day of, 187., and has in all respects fully kept and performed his said agreement; yet the said defendant C. D., has not, nor has any one for him, paid to the plaintiff the said sum of, dollars, nor any part thereof.

V. Plaintiff avers that the whole of the land above described is required for the convenient use and occupation of said dwelling-house.

VI. That [follow paragraph V of Form No. 454, *ante*.]

VII. [Same as paragraph VI of No. 454.]

VIII. [Same as paragraph VII of No. 454.]

Wherefore the plaintiff prays:

1. That the court may find and ascertain the amount due from the defendant C. D., to this plaintiff under said con-

tract, and that he have judgment against the said C. D., therefor.

2. That the court may find and ascertain what sum, if any, was due from the defendant A. B. to the defendant C. D., at the date of the filing of plaintiff's lien.

3. That it may be decreed by the Court that the plaintiff has a lien upon said dwelling-house and the lands described herein for the sum so found due to him from the said C. D., and the costs of this action, including dollars paid for verifying and recording said lien, and dollars as an attorney's fee herein, that said land and dwelling-house may be sold under the order and decree of this Court, and the proceeds applied to the payment of the costs aforesaid and the sum so found due to the plaintiff; that he have execution against the said C. D. for any deficiency, and for other and further proper relief.

No. 456.

i. Vendor against Purchaser, to Enforce Lien.

[TITLE.]

The plaintiff alleges:

I. That on theday of, 187., at, the plaintiff sold and conveyed to the defendant..... acres of land, situated in [describe the premises specifically], for the sum of.....dollars, for which the defendant agreed to pay the plaintiff the sum ofdollars [state terms of sale].

II. That the defendant is indebted to the plaintiff in the premises.....dollars, no part of which has been paid.

III. That the plaintiff has a lien as vendor upon said premises, for the payment of said purchase-money, which he claims in this action.

Wherefore the plaintiff demands judgment:

1. For the said sum of.....dollars, with interest from the....day of....., 187..

2. That the said premises may be ordered sold for the payment thereof [etc., etc.]

No. 457.

ii. *Vendor against Purchaser, and his Grantee, and Judgment-Creditors, to Enforce Lien.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he was owner in fee of the real property hereinafter described, and on the....day of....., 187., he sold the same to the defendant A. B., for the sum of..... dollars, and thereupon by his deed conveyed the same to the defendant A. B. [in fee], which premises are described as follows [description as in deed]:

II. That the said A. B. paid the plaintiff.....dollars, part of said purchase-money, and on the....day of....., 187., at....., gave to the plaintiff his promissory note for.....dollars, the residue thereof, payable on the....day of....., 187..

III. That on the....day of....., 187., at....., the plaintiff demanded payment of the defendant A. B. [of said note, or] of the residue of said purchase-money; but he did not pay the same.

IV. That the said C. D. purchased of the said A. B. a portion of said premises, with the full knowledge that the said A. B. had not paid the balance of said purchase-money, and took a conveyance from the said A. B. to him for the said premises so by him purchased of the said A. B.

V. That the said E. F. claims to have recovered judgment against the said A. B. for dollars, on the day of, 187., in the Court, in the County, State of, and has caused execution to be issued thereon, and is proceeding to sell the part of said premises not sold to the said C. D., whereby the said plaintiff will wholly lose the balance of the said purchase-money, as the said A. B. is wholly insolvent, and unable to pay the same.

Wherefore the plaintiff demands judgment:

1. Against the said A. B. for the said sum of dollars, together with interest thereon from the day of, 187., and the costs of this action.

2. That in case the said A. B. shall not pay the said judgment, that the said premises may be sold, and so much of

the proceeds as may be necessary be applied to the payment of the judgment so to be rendered.

94. Execution.—In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and the return of *nulla bona*, to sustain the allegation of insolvency: *Walker v. Sedgwick*, 8 Cal. 398.

95. Extent of Lien.—A vendor's lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value: Civil Code, sec. 3048. As to purchaser's lien for money paid, in case of a failure of consideration, see Id. sec. 3050.

96. Failure of Performance.—It could not be a defense that only one note was due, as that would be sufficient to show a failure of performance: *Creary v. Bowers*, Cal. Sup. Ct. Jan. T. 1862, not reported; see Note 98.

97. Lien as a Charge.—The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase-money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee: *Sparks v. Hess*, 15 Cal. 186; *Hill v. Grigsby*, 32 Id. 58.

98. Notes not Security.—The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase-money: Civil Code, sec. 3046. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract: *Walker v. Sedgwick*, 8 Cal. 398. The execution of two notes for the amount due upon a note and mortgage, when the mortgage is not canceled, will not defeat an action for the foreclosure of the same, commenced after the second notes are due and unpaid: *Creary v. Bowers*, Cal. Sup. Ct., Jan. T., 1862, not reported.

99. Purchase-money is, in equity, a lien on land sold where the purchaser has taken no separate security: *Salmon v. Hoffman*, 2 Cal. 138; *Hill v. Grigsby*, 32 Cal. 55; *Chilton v. Braiden's Administratrix*, 2 Black, U. S. 458. Married women are included in this rule: Id. And when the vendor has not conveyed the title, his position is analogous to that of a mortgagee: *Salmon v. Hoffman*, 2 Cal. 138; *Hill v. Grigsby*, 32 Cal. 55.

100. Right, when Enforced.—The equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require: *Sparks v. Hess*, 15 Cal. 186; *Hill v. Grigsby*, 32 Cal. 58.

101. Security.—A vendor's lien does not exist in this state, where a mortgage security is taken for the purchase-money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land: *Hunt v. Waterman*, 12 Cal. 301. A verbal agreement by the vendee to reconvey the

land to the vendor, if he does not pay the purchase price, does not prevent the enforcement of a vendor's lien: *Gallagher v. Mars*, 50 Id. 23.

102. Vendor's Lien.—A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules of equity: *Hunt v. Waterman*, 12 Cal. 305.

103. Waiver of Lien.—The equitable lien which a vendor of real estate, after an absolute conveyance, has for the unpaid purchase-money, is waived by the taking of a mortgage to secure the same, although the mortgage is void and cannot be enforced: *Camden v. Vail*, 23 Cal. 633; see also *Baum v. Grigsby*, 21 Id. 172. B. made a parol gift to his daughter R., who took and kept possession of the same twelve years. She then sold the land to M., receiving his notes therefor, and B., at her request, conveyed the land to M. As against the purchaser, R. had a vendor's lien: *Russell v. Watt*, 41 Miss. 602. As to when transfer of contract waives the lien, see Civil Code, section 3047.

No. 458.

i. To Foreclose Chattel Mortgage.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the said defendant made and executed his certain promissory note, in writing, in the words and figures following, to wit: [here copy note] whereby he promised to pay plaintiff the sum of dollars, with interest at the time and in the manner therein specified, in gold coin of the United States, and then and there delivered the said note to the said plaintiff.

II. That at the time and place aforesaid, in order to secure the payment of said promissory note, the said defendant executed and delivered to the plaintiff his certain instrument in writing, under seal, known as a chattel mortgage, a copy of which is hereto annexed as a part of this complaint, marked exhibit "A," which said chattel mortgage was made in good faith, for the purpose aforesaid, without intent to defraud creditors or purchasers, and was verified, acknowledged and recorded, pursuant to the statute in such case made and provided.

III. That the property mentioned and described in said chattel mortgage and the schedule annexed consisted of [here describe property and where situated].

IV. That no proceedings have been had at law, or otherwise for the recovery of said sum and interest, or any part thereof, and the same is still wholly owing and unpaid.

Wherefore the plaintiff prays judgment.

1. That the defendant be foreclosed of all interest, lien and equity of redemption in said mortgaged property, to wit, the said goods and chattels.

2. That the same be sold, and that the proceeds thereof be applied to the payment of the costs and expenses of this action and of counsel fees not to exceed the sum of dollars, and of the amount due on said note and mortgage, with interest thereon up to the time of payment, at the rate of per cent. per month.

3. That the defendant be adjudged to pay any deficiency that may remain after applying all said money as aforesaid, and for such other and further relief as to this court may seem just in the premises.

104. Action Lies.—Under section 246 of our Practice Act (Cal. Code C. P., sec. 726), if commercial paper be mortgaged, the mortgage may be foreclosed, and the securities sold under the decree; and by sections 217 and 220 (688 and 691 Code C. P.), such securities may be seized and sold under execution on a judgment at law: *Davis v. Mitchell*, 34 Cal. 87; cited in *Donohoe v. Gamble*, 38 Cal. 352.

105. Assignment and Delivery.—Where a *chose in action* is assigned and delivered as collateral security for the payment of a debt due the assignee, the assignment and delivery to the assignee of the *chose in action* are necessary to give the latter full authority to readily control the security and make it available; but this does not necessarily constitute the transaction a chattel mortgage as distinguished from a pledge: *Gay v. Moss*, 34 Cal. 125.

106 Chattel Mortgage.—A., the owner of a quartz-mill in Amador county, executed a mortgage on the same to B. Afterwards A. purchased at Sacramento a steam engine and boiler, and to secure the purchase-money, executed to C. a chattel mortgage on the same, and then transported them to Amador and placed them in the quartz-mill, so that they became a part of the realty: *Held*, that C.'s mortgage on the steam engine and boiler had priority over the mortgage of B.: *Tibbetts v. Moore*, 23 Cal. 208. If, at the time of the execution and delivery of a promissory note, the payor also gives the payee a bill of sale of personal property by way of mortgage to secure the note, and also delivers possession of the property, the payor has a right to have the property mortgaged applied in satisfaction of the debt; and if the payee sells any of the property, he has a right to have the proceeds or value applied towards the satisfaction of the debt: *McGarvey v. Hall*, 23 Cal. 140.

107. For Future Advances.—A mortgage given in good faith for the purpose of securing future advances expected to be made, is a good and valid security. Such mortgage need not express its object on its face, although it would be better if it should. But a mortgage knowingly given for a greater sum than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor: *Tully v. Harloe*, 35 Cal. 302.

108. Pledge.—A pledge of personal property may be foreclosed by a decree of a court of equity, in the same manner, and with like effect, as if it were a mortgage: *Donohoe v. Gamble*, 38 Cal. 350; Cal. Civ. Code, secs. 3011 and 2967.

109. What may be Mortgaged.—As to what may be mortgaged, see Civil Code, section 2955, as amended 1878. As to form of mortgage, and when void as to third persons, see *Id.* secs. 2956–7.

CHAPTER II.

COMPLAINTS FOR NUISANCES.

No. 459.

i. For Erecting a Nuisance.

[TITLE.]

The plaintiff complains and alleges:

I. That he is, and at all the times hereinafter mentioned, was the owner and possessed of the house and lot number street,

II. That the defendant was also then and there the owner and possessed of certain other premises contiguous to [or in the vicinity of] plaintiff's said premises.

III. That the defendant on or about the day of, 187 . . ., erected on his said premises a slaughter-house and cattle pens, and furnaces and vats for making lard and tallow, and thereafter kept in his said pens, and slaughtered in his said slaughter-house, large numbers of cattle and hogs, and made thereat tallow and lard, thereby, and by means of said several acts and things caused noxious and offensive smells, and loud and offensive noises, and tainted and corrupted the atmosphere so as to render the dwelling-house and premises of the plaintiff unfit for habitation, and compelled plaintiff to remove from and abandon the same, and thereby also prevented him from renting or otherwise receiving any income therefrom [if other special damage accrued, state it], to the damage of the plaintiff dollars.

Wherefore the plaintiff demands judgment:

1. That the defendant be restrained by injunction from maintaining or using the said building as a slaughter-house, or otherwise, to the nuisance of the plaintiff, or permitting it to be so used.

2. That the plaintiff recover from the defendant..... dollars damages, and his costs.

No. 460.

ii. *For Abatement of a Nuisance.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all the times hereinafter mentioned was the owner in fee of [the house and lot No., Street,].

II. That the defendant is, and at all the said times was the owner in fee of [the lot No., Street,, adjoining said property].

III. That on the....day of....., 187., the defendant erected upon his said lot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff, or as the case may be].

IV. That the plaintiff has been compelled by reason of the premises to abandon the said house, and has been unable to rent the same.

Wherefore the plaintiff demands judgment, that the said nuisance be abated.

NOTE.—This, in substance, is taken from the New York Code Commissioners' Book of Forms.

1. Action to Abate.—The action to abate a nuisance is “a case in equity,” and from judgment rendered in it an appeal lies: *People v. Moore*, 29 Cal. 427. An action for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff: *Call v. Buttrick*, 4 Cush. 345. Nor does the abatement of a nuisance prejudice the right of any person to recover damages for its past existence: Cal. Civ. Code, sec. 3484. But as the county court has no jurisdiction of the action for damages except as an incident to the power to abate, the abatement before suit brought deprives that court of the jurisdiction for any purpose: *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. It was held in *Stiles v. Laird*, 5 Id. 122, that the statute did not take away any common law remedy for the abatement of nuisances; but see sec. 18 Code C. P. Section 731 Id., gives an action to abate, and secs. 3495 and 3502 of the Civil Code authorize the abatement, when it can be done without committing a breach of the peace, without bringing an action.

2. Building Adjacent.—Under the civil law, if a man build a house upon land of his own and sell it, neither he nor a subsequent grantee can build on their land adjacent so as to destroy windows which were a necessary and

essential part of the house: *Palmer v. Fletcher*, 1 Lev. 122; Sid. 167; 1 Keble, 553; *Rosewell v. Prior*, 6 Mod. 116; *Coutts v. Gorham*, Mood. & Malk. 396; *Compton v. Richards*, 1 Price, 27; *Story v. Odin*, 12 Mass. 157; see, also, *Canham v. Fisk*, 2 Cr. & J. 126; 2 Tyrwh. 156. But if he has sold the vacant lot and kept the house, without reserving the benefit of the lights, the vendee might build against his house: *Tenant v. Goodwin*, 2 Ld. Raym. 1093. If two men own adjoining lots, and one of them has erected a brick building on his lot, the wall of which leans so as to project over the lot of the other and over a low wooden building thereon, so as to prevent the raising and repairing of the wooden building, the brick wall is a nuisance, and its maintenance imports damage to the other party, notwithstanding the fact that the brick wall is safe and secure: *Meyer v. Metzler*, 51 Cal. 142.

3. Bridge.—The fact that a bridge is a great public benefit will not prevent its being a nuisance, if it obstruct navigation: 4 Ad. & El. 384; *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. U. S. 518. A bridge over a navigable stream, erected for public purposes, and producing a public benefit, and leaving a reasonable space for the passage of vessels, is not a nuisance: *Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485; *Works v. Junction Railroad*, 5 McLean, 475; *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. U. S. 318. If an abutment to a bridge is wrongfully built in the channel of a stream, the remedy, if any exists, is against him by whom the injury was committed: *Crowell v. Sonoma Co.*, 25 Cal. 313. The state of Pennsylvania, as the proprietor of public works, suffered special damage in its property by reason of a bridge across the Ohio river, and this damage continued from day to day, was not capable of proof, and computation in each item thereof, and so was not reparable by the course of the common law: *Held*, that a bill in equity by the state, to enjoin the bridge as a public nuisance, could be maintained: *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. U. S. 518.

4. Corporations.—If a corporation is disturbed in the enjoyment of its franchise or incorporeal right, such a disturbance is technically a nuisance: *Charles River Bridge v. Warren Bridge*, 6 Pick. 376; *Boston Water Power v. Boston and Worc. R. R. Co.*, 16 Pick. 512. Thus, a toll bridge corporation may restrain a city from unlawfully laying out its bridge as a highway: *Cent. Bridge v. Lowell*, 4 Gray (Mass.) 474. So, a railroad company which is unlawfully disturbed in the enjoyment of its franchise, may maintain a bill for an injunction as of a nuisance: *Charles River Bridge v. Warren Bridge*, 6 Pick. 376; *Boston and Lowell R. R. Co. v. Salem and Lowell R. R. Co.*, 2 Gray (Mass.) 1.

5. Definitions.—A nuisance is anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal or basin, or any public park, square, street or highway: Civil Code, sec. 3479. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal: *Id.*, sec. 3480. Every nuisance not included in the definition of the last section is a private nuisance: *Id.*, sec. 3481. Nothing which is done or maintained under the ex-

press authority of a statute, can be deemed a nuisance: *Id.*, sec. 3482. The fact, whether a structure is a public nuisance is a question, not for the court, but for the jury: *People v. Davison*, 30 Cal. 383. All encroachments upon privileges which are open to the whole community, though they may have been uninterruptedly prolonged, are nevertheless liable to be suppressed: *Weld v. Hornby*, 7 East. 195; *Carter v. Murcott*, 4 Burr. 2163; *Knox v. Chaloner*, 42 Me. 156. A nuisance can never be legitimated: Ang. on Water-courses, 436; Woolrych's Law of Waters, 270; *Knox v. Chaloner*, 42 Me. 150; *Kenwick v. Morris*, 3 Hill, 621; *Coates v. New York*, 7 Cow. 585; *People v. Cunningham*, 1 Den. 536; *Commonwealth v. Upton*, 6 Gray, 473.

6. Easement.—A liberty, privilege, or advantage in land, without profit existing distinct from an ownership in the soil, is an easement: 3 Vt. 279; 1 Crabb's Real Prop. 125. So, the right to use a public highway is a public easement: 1 Conn. 103, 132; Smith's Lead. Cas. 98. A private easement is a privilege, service, or convenience, by prescription, grant, or necessary implication, and without profit, as a way over his land, a gateway, water-course, and the like: Kitch. 105; 3 Cruise Dig. 484; Servitudes of Civil Law Inst. 2, 3; 1 Burr. Dict. 530. An easement may be created by grant, or it may be acquired by prescription. The grant may be either express or implied. A reservation of an easement in the deed by which the lands are conveyed is equivalent for the purpose of the creation of the easement to an express grant of the easement by the grantee of the lands: *Wagner v. Hanna*, 38 Cal. 116. The right of landing with, and drawing seines upon another's land is an easement: *Hart v. Hill*, 1 Whart. 138; and, therefore, may be acquired by prescription, like a right of way: Ang. on Water-courses, 77; see Cal. Civ. Code, sec. 552 and secs. 801 to 811.

7. Injunction.—A nuisance existing under a local law, if it amounts not to a national one, will not be enjoined by the U. S. circuit court: *Griffing v. Gibb*, 1 McAll. 212. Although indictment is the proper remedy in the case of a public nuisance, yet when it is obviously necessary that such a nuisance should be immediately suppressed, a court of chancery may interfere by injunction until process by indictment can be put in motion: Ang. on Water-courses, 751; *Rowe v. Granite Bridge*, 21 Pick. 344. The plaintiff is entitled to an injunction at once, unless the removal of the nuisance is physically impossible. Also, to prevent a threatened injury to his right of way: *Tuolumne W. Co. v. Chapman*, 8 Cal. 392; *Kittle v. Pfeiffer*, 22 Id. 491. The common law remedy for a public nuisance will not be affected by a statute imposing a penalty for the offense unless an intent is conceived to exclude these remedies: *Renwick v. Morris*, 7 Hill. 575. In what cases will equity enjoin a nuisance? See *Parker v. Woolen Company*, 2 Black, U. S. 545. An injunction will issue notwithstanding the injury is occasional, as from the burning of brick kilns; nor will it make any difference that the property injured consists of ornamental trees; articles of luxury are as much within the protection of the law as articles of necessity: *Campbell v. Seaman*, 63 N. Y. 568.

8. Jurisdiction of Action Concerning Nuisances.—The statute of this state, defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of the nuisances which the statute does not embrace: *Stiles v. Laird*, 5 Cal. 122. The county courts have original jurisdiction of actions to prevent or abate a nuisance: *People v. Moore*, 29 Cal. 427. The action is not a "special case:" *Parsons v.*

Tuolumne Wat. Co., 5 Cal. 43. The district courts have constitutional jurisdiction of cases of nuisances. The grant of such jurisdiction by statute to the county courts cannot take away the constitutional jurisdiction of the district courts: *Yolo v. Sacramento*, 36 Cal. 193; *Courtwright v. B. R. A. W. and M. Co.*, 30 Cal. 573. A court of chancery cannot make a decree to restrain, or give compensation for a nuisance or tort to real property lying in another jurisdiction, hence it cannot entertain a bill by one railroad corporation to restrain another from doing acts continually injurious to the estate and franchise of the complainants by crossing their railroad and intruding within their exclusive limits, if outside of the jurisdiction of the court: *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. U. S. 233. But an action for damages may be maintained in the state in which the property injured is situated, although the business which occasions the injury is carried on upon lands in another state: *Ruckman v. Green*, 16 N. Y. Sup. Ct. (9 Hun.) 225. In a suit for the abatement of a nuisance, a court of equity, confining its inquiries within the limits of its local jurisdiction, must be governed by the same rules which a court of law would act upon in trying an indictment for the same nuisance: *Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485. Where a bill is brought in a federal court to abate a nuisance, the jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance: *Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485. In cases of private nuisance, the jurisdiction of courts of equity and courts of law is concurrent, though many cases will sustain an action at law which would not justify relief in equity: *Parker v. Woolen Company*, 2 Black, U. S. 545; see Am. Const. of Cal. 1863.

9. Nuisance and Trespass—Distinction.—The distinction between nuisance and trespass is, that nuisance is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious while trespass is a direct and immediate invasion of property: Ang. on Water-courses, 576.

10. Parties Plaintiff.—Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance: Cal. Code C. P., sec. 731. A common nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it without regard to the question whether it is an immediate obstruction or injury to him: *Gunter v. Geary*, 1 Cal. 462; Civil Code, sec. 3495. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it: *Gunter v. Geary*, 1 Cal. 462; Civil Code, secs. 3502-3. And an action to abate can be maintained only by the owner in fee of the premises injured, against the owner in fee of the premises on which the nuisance exists: *Ellsworth v. Putnam*, 16 Barb. 568. A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information by which the nuisance may be abated, and the person who caused it may be punished: Cal. Penal Code, sec. 370 *et seq.* If any particular individual shall have sustained special damage from the erection of it, the special and private injury resulting from a nuisance is the only ground on which a private individual can ask for relief against it: 18 Ves. 215; 19 Id. 616; 6 Johns. Ch. 439; 12 Pet. 98; *Spooner v. McConnell*, 1 McLean, 337; and see *Works v. Junction R. R.*, 5 Id. 425. Sev-

eral persons having independent claims to relief, may join in a suit to restrain a nuisance which affects the respective claims of both: *Murray v. Hay*, 1 Barb. Ch. 59. Certain obstructions and injuries to highways are declared to be nuisances, and an action to abate the same must be brought by the road overseer or commissioner of highways: See Political Code, secs. 2743 to 2747. Such action cannot be brought in the name of the county as plaintiff: *San Benito Co. v. Whitesides*, 51 Cal. 416.

11. Parties Defendant.—When an owner contracts for doing certain work upon his property, if a nuisance necessarily occurs in the ordinary mode of doing such work, the owner is liable, but if a nuisance happens by the negligence of the contractor or his servants, the contractor alone is responsible: *Chicago City v. Robbins*, 2 Black, U. S. 418. In an action of nuisance or trespass the defendant has no right to inquire into the good faith of the plaintiff's possession: *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308. Where a nuisance is committed by several, the plaintiff may sue any one of those who did the wrong, and the non-joinder of the others cannot be pleaded in abatement: 1 Chitt. Pl. 75; *Sutton v. Clark*, 6 Taunt. 29. But if the parties committing the tort are joint owners of the land, and the tort consisted in the omission of some act which they are bound as such owners to perform, then all must be joined in the action: 1 Chitt. Pl. 76. If one of two tenants in common of a mill is guilty of malfeasance by using it to the nuisance of a stranger, the other owner, not participating, is not liable: Ang. on Water-courses, 592; *Simpson v. Seavey*, 8 Greenl. 138.

12. Private Nuisance.—Where a bill against a private nuisance does not show plainly that complainant is without a remedy at law, it must be dismissed: *Parker v. Woolen Co.*, 2 Black, U. S. 545. A distillery with styes in which large quantities of hogs are kept, the offal from which renders the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance: *Smith v. McConathy*, 11 Mo. 517. It is not necessary that the corruption of the atmosphere be such as to be dangerous to health; it is sufficient that the effluvia are offensive to the senses, and render habitations uncomfortable: *Eames v. N. E. Worsted Co.*, 11 Met. 572. A dense smoke, laden with cinders, liable to continue twelve hours twice a month, and to penetrate houses at distances of from forty to two hundred feet, in a part of the town occupied by mechanics for their homes and for trades requiring a certain amount of smoke, is a nuisance: *Ross v. Butler*, 4 C. E. Green, 294. But in view of the damage to very large iron works which an injunction would cause, and where the injury could be compensated for at law, an injunction ought not to be granted: *Richard's Appeal*, 57 Penn. 105; see, also, *Rhodes v. Dunbar*, 57 Penn. 274. Where defendants built a platform in front of plaintiff's lot, and on his side of the way, as plaintiff presumptively owned to the middle of the street, he could maintain a private suit: *Higbee v. Camden and Amboy R. R. Co.*, 4 C. E. Green, 276.

13. Private Nuisance—Allegations.—In an action for a private nuisance it is not necessary to allege or prove any special damage; but in a private action for a public nuisance special damages must be averred and proved: *Smith v. McConathy*, 11 Mo. 517. It becomes the gist of the action: *Baker v. Boston*, 12 Pick. 196.

14. Public Gaming House.—A public gaming house is a nuisance: See

United States v. Ismenard, 1 Cranch C. Ct. 150. A public bowling alley, kept in connection with a lager beer saloon in a populous town, is not *per se* a public nuisance: *State v. Hall*, 3 Vroom. 158.

15. Public Nuisances.—The following have been held public nuisances, viz.: The erection of a house on a highway: *Gunter v. Geary*, 1 Cal. 467; *People v. Davidson*, 30 Id. 383. The appropriation of that part of the river or bay below low water or low tide is a public nuisance: *Gunter v. Geary*, 1 Cal. 462. Any obstruction to the navigation of a public navigable stream, is, upon established principles, a public nuisance: *Mayor etc. of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91. It does not follow as a legal conclusion that a wharf erected below high-water mark in tide waters, and upon the soil thereunder belonging to the State, is a public nuisance, or an injury to commerce and navigation. Whether such a wharf is a public nuisance is a question of fact: *People v. Davidson*, 30 Cal. 379. An injunction will be granted to restrain the erection of a wharf in tide waters where it is a public nuisance, or will be followed by some form of irreparable damage: *Id.* A common scold is a nuisance: See *United States v. Royall*, 3 Cranch C. Ct. 620. To keep a large quantity of gunpowder near where persons dwell is a nuisance: *Myers v. Malcolm*, 6 Hill, 292; *Borden v. Crocker*, 10 Pick. 388; *Lansing v. Smith*, 4 Wend. 9; *Harrison v. Sterett*, 4 Har. & McHen. 540; *Story v. Hammond*, 4 Ohio, 376; *Shaw v. Cumisky*, 7 Pick. 76. A house on fire, or those in the immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interest of society: *Surocco v. Geary*, 3 Cal. 73. The constitutional provision requiring payment for private property taken for public use does not apply: *Id.* Nor can one who abates such a nuisance be held personally responsible for trespass: *Id.*

16. Public Nuisance—When Action Lies.—An action will not lie for damages for a public nuisance, unless plaintiff has sustained some special damage: Comyns' Dig. Nuisances; 9 Code Rep. 112; 11 East, 61; 12 Id. 432; 4 M. & S. 101; *Stetson v. Faxon*, 19 Pick. 147; *Pittsburg v. Scott*, 1 Penn. St. Rep. 309; *Thayer v. Boston*, 19 Pick. 511; *Myers v. Malcolm*, 6 Hill, 292. The facts that the parties who bring an action to abate a nuisance caused by obstructing a public road, own land fronting on the road, and have no other means of access, do not show such special damage to the plaintiffs in addition to that sustained by the public as enables them to maintain the action: *Aram v. Schallenberger*, 41 Cal. 449. The special damage must be such as might legitimately flow from the nuisance, and must be specially pleaded: *L. T. Co. v. S. W. W. R. Co.*, 41 Id. 564.

17. Remedy.—By judgment the nuisance may be enjoined or abated as well as damages recovered: *Will v. Sinkwitz*, 41 Cal. 594; Cal. Code C. P., sec. 731. To entitle a party to an injunction in a case of a nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages: *Middleton v. Franklin*, 3 Cal. 241. In an action to abate a nuisance damages are only an incident to the action, and the failure to recover them does not affect the question of costs: *Hudson v. Doyle*, 6 Cal. 102; affirmed in *Courtwright v. B. R. A. W. M. Co.*, 30 Id. 576. Courts of equity, pursuing the analogy of the law that a party may maintain a private action for special damages, even in the case of public nuisance, will

grant an injunction against a public nuisance at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy. But the plaintiff in such case, to maintain his suit in equity, must aver and prove an individual injury: 19 Ves. 616; 6 John. Ch. 439; *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485. Where an individual is damaged by a public nuisance, he has the same remedy as when injured by a private nuisance: *Welton v. Martin*, 7 Mo. 307; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511; *Shaw v. Cummisky*, 7 Pick. 76; *Holman v. Townsend*, 13 Met. 297. And plaintiff must prove that the damage he has sustained "is not common to others:" Co. Lit. 56, a; 19 Pick. 155.

18. Riparian Proprietor.—Where a river is made a boundary to the land, the grantee becomes riparian proprietor, and is entitled to the land the river covers, *ad filum medium aquæ*, and any (in case of a grant) subsequent grantee under the same description, is alike entitled: Ang. on Water-courses, 19; *People v. Canal Appraisers*, 13 Wend. 355; 17 Wend. 571; *Ex parte Jennings*, 6 Cow. 548; *Commissioners v. Kempshall*, 26 Wend. 404.

19. Rules for Abatement of Nuisance.—Rules which govern a court of equity in a suit for the abatement of a nuisance: *Mississippi and Missouri Railroad Co. v. Ward*, 2 Black, U. S. 485.

20. Steam Engine in Cellar.—The erection of a steam engine and machinery and a grist-mill in the cellar, under an auction store, held not to be such an injury as to require a restraining power of the court; at least not, until the question of nuisance should be determined by a jury, and even then the remedy at common law is adequate: *Middleton v. Franklin*, 3 Cal. 241; see *Saltonstall v. Banker*, 8 Gray (Mass.) 195.

21. Street Railroads.—Where a railroad track is on a public street, owners of property in the vicinity, to sustain a complaint against its construction, must establish that it is a public nuisance, and that they have sustained special damage: *Black v. Phil. and Reading R. R. Co.*, 58 Penn. 249; *Severy v. C. P. R. R. Co.*, 51 Cal. 194. Where a company is authorized by law to construct a street railroad with switches and turnouts, the presumption of law that the switches and turnouts are necessary, and the burden of proving that they are a nuisance is cast on the plaintiff: *Carson v. Cent. R. R. Co.*, 35 Cal. 325. In an action by an owner and occupant of a lot fronting on a street for special damages by reason of a nuisance caused by the obstruction of the public street in front of the lot, testimony as to the market value of the lot, and the effect of the nuisance as to such market value, is not admissible: *Severy v. C. P. R. R. Co.*, 51 Id. 194.

22. Verdict.—In an action to abate a nuisance, a general verdict in favor of the plaintiff is sufficient to sustain a judgment abating the same: *Blood v. Light*, 31 Cal. 115. So if special findings are not inconsistent with it: Id.

23. When Action Lies.—In general, courts of equity do not take jurisdiction in cases of nuisance until the party aggrieved has established his right by an action at law, unless some special ground is shown, such as irreparable injury, multiplicity of suits, or the like. Reviewing many authorities: *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, U. S. 545; *Irwin v. Dixon*, 9 How. U. S. 10; *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13

How U. S. 518, 561; in which authorities may be found the history of the jurisdiction of courts of equity in these cases.

24. Who Liable.—The author of a nuisance is answerable for all the damages thereof, and after a recovery of damages for its erection, another action may be maintained for its continuance. Each continuance is a new nuisance: Ang. on Water-courses, 587. So that, if a person erects a mill, to the nuisance of another, every occupier of it afterwards, who permits a continuance of the nuisance, is subject to an action: Ang. on Water-courses, 588, and cases there cited; see *Ellsworth v. Putnam*, 16 Barb. 565. If the purchaser be ignorant of the consequences and damage occasioned he must have notice of it, and a request must be made to remove the nuisance before an action can be brought: Ang. on Water-courses, 590. But, of course, where the nuisance is committed by the defendant himself, no notice or request of removal before action is necessary: Id. The person whose duty it was to remove the nuisance, or to keep a hole protected, is alone liable: *Blake v. Ferris*, 1 Seld. 48. A landlord is liable to his tenant for injury from the bursting of a defective sewer: *Alston v. Grant*, 24 Eng. L. & Eq. 122; *Tenant v. Goldwin*, 2 Ld. Raym. 1089; *Cooper v. Barber*, 3 Taunt. 99.

No. 461.

iii. For Continuance of a Nuisance.

[TITLE.]

The plaintiff complains and alleges:

I. That he is, and at all the times hereinafter mentioned was, the owner and possessed of [the house and lot No.,Street,].

[II. and III. follow Form No. 459.]

IV. That on the....day of....., 187..., the plaintiff requested the defendant to remove the said [slaughter-house, or to cease using it for that purpose], but he has not done so.

[Demand of Judgment.]

25. Allegation of Request.—By some of the courts of New York, a request is held necessary against a mere continuer of a nuisance: *Hubbard v. Russell*, 24 Barb. 407; but see, *contra*, *Brown v. Cayuga and Susq. R. R.*, 12 N. Y. 492. I cannot, however, upon principle, see any reason in the rule, if there be such a rule, which requires notice to discontinue the doing an unlawful act, before bringing an action therefor; but “where a private nuisance results from a mere omission of the wrong-doer, and cannot be abated without entering upon his land, reasonable notice must be given before entering to abate it:” Civil Code, sec. 3503. See, also, Id., sec. 3502. Where the action is for damages for a nuisance erected by a previous owner, it should appear that before the commencement of the action the defendant had notice or knowledge of the existence of the nuisance, but plaintiff need not prove a request to abate: *Pinney v. Berry*, 61 Mo. 359; 51 N. Y. 513.

26. Allegation where Land has been Transferred.—That on or about the....day of....., 187..., the defendant A. B. conveyed said premises to the defendant C. D., who ever since has been in possession of the

same, and wrongfully maintains said nuisance. That on the..... day of, 187..., the plaintiff requested him to remove and abate the same.

27. Continuance.—Every continuance of an obstruction is in itself an offense: *Renwick v. Morris*, 7 Hill, 575. The action lies against him who erects a nuisance, and against him who continues a nuisance erected by another: *Staple v. Spring*, 10 Mass. 72; *Hodges v. Hodges*, 5 Met. 205; Civil Code, sec. 3483. And every use of an erection which is a nuisance is a new nuisance. And one who continues a nuisance may be sued without notice, or a request to him to abate it: *Conhocton Stone Co. v. Buffalo, N. Y. and E. R. R. Co.*, 52 Barb. 390.

No. 462.

iv. *For Obstructing a Way.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was possessed of a house in the Town of, County of [or describe premises], and that the same fronted upon a certain road or highway.

II. That he was accustomed to pass [with vehicles, or on foot] along that certain highway [or private way] leading to his said house.

III. That on theday of, 187..., the defendant obstructed the said highway, so that plaintiff could not pass [with vehicles, or on foot, as the case may be] along said highway, and has ever since obstructed the same.

IV. [State special damage, if any.]

[Demand of Judgment.]

28. Action, when it Lies.—An action to abate a nuisance in a highway by water, obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land: *Blanc v. Klumpke*, 29 Cal. 156. If the free use of his property is interfered with, he may have his private action to abate the same: *Id.* That an action may be maintained by the road overseer or commissioner of highways, see Political Code, secs. 2743 to 2747.

29. Bay or River as a Highway.—All that part of a bay or river below low water or low tide, is a public highway, common to all citizens, and if any person appropriate it to himself exclusively, the presumption is that it is a detriment to the public: *Gunter v. Geary*, 1 Cal. 462.

30. Building on a Street.—A person building a storehouse on a street, who, in consequence of the city's raising the carriage-way of the streets, raises the sidewalk so as to make it conform to the carriage-way, thereby obtaining vaults and an area for the benefit of his building, does not do a public work nor relieve himself from the penalty of making a nuisance, if a nuisance is made by what he does: *Robins v. Chicago City*, 4 Wall. U. S. 657. Buildings erected on public grounds or highways, acquire no right, either on

account of time or expenditure: *Philadelphia v. Phil. and Reading R. R. Co.*, 58 Penn. 253. It is a nuisance to erect a building on a highway: *Gunter v. Geary*, 1 Cal. 467.

31. Impediment in Street.—Defendants dug a deep hole on their premises close to the line of a public street, and threw out earth and stones upon the sidewalk. The plaintiff, in trying to pass the obstruction on the sidewalk, went a little upon the defendants' land, fell into the hole, and was injured. It was a dark night, and defendants had provided no light. The plaintiff was using due care: *Held*, that the fact that, under the above circumstances, he went upon defendants' land, and was injured there, did not bar his action: *Vale v. Bliss*, 50 Barb. 358.

32. Injunction.—If the plaintiff has suffered a particular injury from the obstruction of a public way, a bill will lie for an injunction: *Cook v. Mayor of Bath*, Law Rep. 6 Eq. 177; *Kittle v. Pfeiffer*, 22 Cal. 491.

33. Nuisances on Public Streets and Highways. If a city, in the exercise of its right to grade highways, creates a stagnant pond on a man's land, close to his house, it is liable in damages: *Nevins v. City of Peoria*, 41 Ill. 503. The breaking up of a street of a town for the purpose of laying gas pipes, without lawful authority, will be enjoined in equity: *Attorney-general v. Cambridge Consumers' Gas Co.*, Law Rep. 6 Eq. 282; not following *Attorney-general v. Sheffield Gas Consumers' Co.*, 3 DeG. M. & G. 304. A toll-gate erected on a public highway, which belongs to a state or people, is a nuisance, and may be abated as such: *El Dorado Co v. Davison*, 30 Cal. 520; *Wales v. Stetson*, 2 Mass. 143. An object which is calculated to frighten a horse of ordinary gentleness, is as much of a nuisance as an obstruction: *Clinton v. Howard*, 42 Conn. 295.

34. Ordinary Care to Avoid.—In cases of obstruction to highways, the plaintiff cannot recover if he did not use ordinary care to avoid the injury: *Smith v. Smith*, 2 Pick. 621; *Irwin v. Spring*, 6 Gill, 200. The plaintiff is not required to plead or prove any fact giving him a title to the way. If the defendant has any right to interrupt him, that is a matter of defense, and until he proves such right he is a wrong-doer: See *St. John v. Moody*, 2 Lev. 148; 1 Vent. 274; *Winford v. Wollaston*, 3 Lev. 266.

35. Relief.—That a demand for damages for obstructing plaintiff's way, and that defendants be compelled to open the way, may be united: See *Getty v. Hudson River R. R. Co.*, 6 How. Pr. 269; see, also, Code C. P., sec. 731, and *Will v. Sinkwitz*, 41 Cal. 594.

36. Right of Way.—A right of way must be by grant or prescription. Mere convenience gives no right: *Seabrook v. King*, 1 N. & McCord (S. C.) 140; *Lawton v. Rivers*, 2 McCord (S. C.) 445. To the creation of a right of way that amounts to an easement, and not merely to a right of way in gross, two tenements are necessary, the dominant to which the right of way belongs, and the servient upon which the obligation rests: Wash. on Eas. 3; *Wolfe v. Frost*, 4 Sand. Ch. 72. In the one there is and in the other there is not a dominant tenement, though a right of way may be granted in gross. This is never presumed when it can fairly be presumed to be appurtenant to some other estate: Wash. on Eas. 28. And it must be granted in writing describing the interest conveyed: *Wagner v. Hanna*, 38 Cal. 117.

37. Special Damages.—In a private action for obstructing a public high-

way, some special damage must be laid, though it is otherwise in respect to a private way: *Lansing v. Wiswall*, 5 Den. 213; *Aram v. Schallenberger*, 41 Cal. 449; *L. T. Co. v. S. W. W. R. Co.*, Id. 564.

No. 463.

v. For Diverting Water from a Quartz Mill.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was possessed of a quartz mill capable of running five stamps, situated [state where], on Creek, in this State.

II. That for more than five years previous to the said time hereinafter mentioned, the plaintiff has had the undisputed usufructuary right to the use of all the water of said creek.

III. That on the day of, 187., the defendant erected a dam across the bed of said creek above the said mill, and thereby diverted the water from the said mill, and ever since has continued the said dam and obstruction to the free flow of the water in said creek, so that less water ran into the plaintiff's mill.

IV. That by reason thereof the plaintiff has been unable to run more than two stamps; whereas before the said diversion of water, he was able to run five stamps, to the damage of the plaintiff dollars.

[Demand of Judgment.]

38. Actions for Diversion of Water.—Such actions are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common, in a joint action: *Parke v. Kilham*, 8 Cal. 77.

39. Actual Appropriation.—A water right is only acquired by an actual appropriation and use of the water. The property is not in the corpus of the water, but is only in its use: *Eddy v. Simpson*, 3 Cal. 249. A right may be acquired to its use which will be regarded and protected as property: *Kild v. Laird*, 15 Cal. 179. But this right carries with it no specific property in the water itself: *McDonald v. Askew*, 29 Cal. 206. Until a claimant is himself in the position to use the water, the water right does not exist in such sense that the mere diversion and use of the water by another is a ground of action for the conversion: *Kimball v. Gearhart*, 12 Cal. 27.

40. Allegation of Right by Prior Appropriation.—That on the day of, 187., and before the diversion hereinafter mentioned, the plaintiff appropriated all the waters of said gulch [or creek] to his use, and from that time till the time hereinafter mentioned, has enjoyed the uninterrupted use of the same.

41. Appropriation.—The natural water in a ravine belongs to the first

appropriator thereof, and for either a diversion or appropriation thereof an action will lie: *Hoffman v. Stone*, 7 Cal. 49; affirmed in *Merced Min. Co. v. Fremont*, Id. 325; *Butte Canal and Ditch Co. v. Vaughn*, 11 Id. 150. And an appropriation for mill purposes stands on the same footing: *McDonald v. Bear River Co.*, 13 Cal. 220. And such appropriation cannot be constructive: *Kelly v. Natoma Water Co.*, 6 Cal. 105. And it must be for some useful purpose: *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Davis v. Gale*, 32 Cal. 26; *McKinney v. Smith*, 21 Cal. 374.

42. Appropriation, how Effected.—The erection of a dam across a natural water course is an actual appropriation: *Kelly v. Natoma Water Co.*, 6 Cal. 105. Surveys, notices, stakes, and blazing of trees, followed by work and actual labor, without abandonment, will in every case where the work is completed give title to the water over subsequent claimants: *Kimball v. Gearhart*, 12 Cal. 27. A notice of intention to appropriate the waters of a stream is evidence of possession, but of itself alone is not sufficient: *Thompson v. Lee*, 8 Cal. 275. The mere act of commencing a ditch, with the intention of appropriating, is not sufficient of itself: *Kimball v. Gearhart*, 12 Cal. 27. To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years: *Grigsby v. Clear Lake Water Co.*, 40 Id. 396. As to partial appropriation, see *Smith v. O'Hara*, 43 Id. 371.

43. Aqueduct from Spring.—An aqueduct from a spring in a separate parcel of land, to a mill belonging to the same owner, with the right to use the water from the spring, was reserved by implication to the grantor as against his grant of that parcel of land by metes and bounds, without reservation of, or reference to, the easement: *Seymour v. Lewis*, 2 Beas. Ch. 439; citing *Nicholas v. Chamberlain*, Cro. Jac. 121; *Lampman v. Milks*, 21 N. Y. 505; see, also, *Hanson v. McCue*, 42 Cal. 303.

44. Diversion a Nuisance.—To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element: *Parke v. Kilham*, 8 Cal. 77. It is a private nuisance: *Tuolumne Wat. Co. v. Chapman*, 8 Cal. 397. So, a ditch to carry away water, which was rightfully flowing to a mining claim, is as much a nuisance as a dam to flood it: *Parke v. Kilham*, 8 Cal. 77; *Yolo Co. v. City of Sac.* 36 Cal. 193.

45. Diverting Water.—An action will lie by the riparian proprietor for diverting water from a stream when the same is needed for agricultural purposes. Proprietors above him may use the water for irrigation, mills, or otherwise, but must return it to its natural channel. For the law on this subject: Gale & Wheat. on Easements, 234; see, also, *Greenslade v. Halliday*, 6 Bing. 379; *Evans v. Merriweather*, 3 Scam. 496; *Ingraham v. Hutchinson*, 2 Conn. 584; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Blanchard v. Baker*, 8 Greenlf. Rep. 253; *Arnold v. Foot*, 12 Wend. 330; *Wadsworth v. Tillotson*, 15 Conn. 366. The right of irrigation is limited by the fact whether the quantity of water in the stream is materially lessened. The use must be such as returns the water to the channel, and does not materially lessen its volume, so that the proprietor below may have enough for his purposes: See Ang. on Water-courses, 122; consult, also, cases cited above.

46. Easements.—Every person through whose land a natural water-course runs has a right, *publici juris*, to the benefit of it, for all the useful pur-

poses to which it may be applied, and no proprietor of land on the same water-course, either below or above, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, not as an easement nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it: *Johnson v. Jordan*, 2 Met. 239; *Tyler v. Wilkinson*, 4 Mason, 397; *Embrey v. Owen*, 6 Exch. 369; *Crossley v. Lightowler*, Law Rep. 3 Eq. 296.

47. Injury must be Continuing.—No equitable remedy can be had for a mere past diversion of a water-course, but when the injury is continuing, relief may be sought in equity: *Tuolumne Wat. Co. v. Chapman*, 8 Cal. 392. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued, it was sufficient for the recovery of damages, but not for an injunction: *Coker v. Simpson*, 7 Cal. 340.

48. Land Bounded by Pond.—When land is conveyed bounding upon a lake or pond, if it is a natural pond, the grant extends only to the water's edge: Ang. on Water-courses, 40; *West Roxbury v. Stoddard*, 7 All. 167. But if it is an artificial pond, like a mill pond, caused by the flowing back of the water of the river, the grant extends to the middle of the stream in its natural state: *State v. Gilmanton*, 9 N. H. 461; *Hathorn v. Stinson*, 1 Fairf. 238; *Robinson v. White*, 42 Me. 209; see Ang. on Water-courses, 41, and cases there cited. Plaintiffs owned the water of an artificial mill pond two hundred years old. Defendants cut and carried away ice from the same. Both parties claimed title to the land covered by said pond: *Held*, that although defendants owned to the middle of the original stream, they were liable, having no more right to take the ice than they would have had to divert the water: *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462.

49. Prescription.—Rights to the use of water become fixed after five years' appropriation of the same: *Crandall v. Woods*, 8 Cal. 136. And the use of water for the time limited by statute, within which an action must be commenced to determine the right to it, raises a presumption of title: *American Co. v. Bradford*, 27 Cal. 360. But the burden of proving adverse possession for five years, as against a party claiming a prior right, rests on the party claiming the right by prescription: *Id.*; see, also, 40 *Id.* 396.

50. Prior Possession.—The foundation of the right to water is the first possession, and this right is usufructuary, and consists not so much in the fluid as in its use: *Eddy v. Simpson*, 3 Cal. 249. The first appropriator of water of a stream has a right to its use and enjoyment to the extent of his original appropriation: *Butte Canal and Ditch Co. v. Vaughan*, 11 Cal. 143; for mining purposes: *Bear Riv. and Auburn Wat. and Min. Co. v. New York Min. Co.*, 8 Cal. 327; or for mill purposes: *Ortman v. Dixon*, 13 Cal. 33; or for gardening purposes: *Rupley v. Welch*, 23 Cal. 452. And that right is not abandoned by turning it into its natural water-course, and mingling it with the natural stream, to conduct it to another point below: *Butte Canal and Ditch Co. v. Vaughan*, 11 Cal. 143. Nor for afterwards changing the use to which he first applied the water: *Davis v. Gale*, 32 Cal. 27; *McDonald v. Bear Riv. Co.*, 13 Cal. 220; *Maeris v. Bicknell*, 7 Cal. 261.

51. Possession, how Alleged.—An averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water: *McDonald & Blackburn v. Bear River and Auburn Water and Mining Co.*, 13 Cal. 220; *Leigh Co. v. Ind. Ditch Co.*, 8 Id. 323. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action: *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.

52. Quantity of Water.—An averment as to the precise quantity of water required for the use of the mill, and to which plaintiff claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit: *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145. Where the right rests in contract, the amount of water to which the plaintiff was entitled should be alleged according to the fact: *Wilbur v. Brown*, 3 Den. 356. As to the sufficiency of this averment, see *Twiss v. Baldwin*, 9 Conn. 291; *Williams v. Morland*, 2 Barnw. & C. 910; *Shears v. Wood*, 7 Moore, 345.

53. Rights of First Appropriator.—The rights of the first appropriator of water are equally protected from damage by subsequent appropriators above him, as well as below him: *Hill v. King*, 8 Cal. 336; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481. The question to be determined in controversies between prior and subsequent locators is: Has the use and enjoyment of the water for the purposes for which the first appropriator claims it, been impaired by the acts of the subsequent claimant? *Hill v. Smith*, 27 Cal. 476. One who appropriates water in a stream for mining purposes, must so use it as not to injure or destroy orchards or gardens bordering on the stream, and located prior to the appropriation: *Wixon v. B. R. and Auburn Water and Mining Co.*, 24 Cal. 367.

54. Riparian Rights.—The right to water must be treated, in this state (California) as a right running with the land: *Hill v. Newman*, 5 Cal. 445. And he to whom it first comes has a right to its reasonable use, as for watering cattle and for domestic purposes; but he has no right to build a dam across it and spread out the water so that it is lost by absorption, and thereby injure another riparian proprietor below: *Ferrea v. Knipe*, 28 Cal. 340. Possession of public lands gives a right to the use of water for natural wants, but not generally to divert it: *American Co. v. Bradford*, 27 Cal. 360.

55. Running Water.—So long as the water of a stream continues to flow in its natural course, it cannot be made the subject of private ownership: *Kidd v. Laird*, 15 Cal. 161. And when the water of a stream leaves the possession of a party, all his right to any interest in it is gone: *Eddy v. Simpsom*, 3 Cal. 249.

56. Sufficient Allegations.—A general allegation in the complaint that plaintiff was entitled to all the water flowing into the cañon at the head of their ditch, entitles them to prove a diversion of the water from the smaller branch of the cañon supplying water to that point: *Priest v. Union Canal Co.*, 6 Cal. 170; see, also, note 63, *post*.

57. Surplus Water.—If the plaintiff was only entitled to surplus water,

his complaint must allege that surplus water existed or would have existed but for the defendant's acts: *Wilbur v. Brown*, 3 Den. 356.

58. Title.—Title to the water need not be alleged, as possession is sufficient title: *Rich v. Penfield*, 1 Wend. 380.

59. Water ditch.—Where the plaintiffs have a right of way for their ditch upon the surface, and the defendants have also a right to mine in the bowels of the earth beneath, which rights are not necessarily incompatible, the maxim, *qui prior est tempore, potior est jure*, is not of controlling weight, but it falls under the maxim, *sic utere tuo ut alienum non lædas*: *Clark v. Willett*, 35 Cal. 534. The question of negligence in the management of a water ditch, and the degree of it, must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam, and the like; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross or even criminal negligence: *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 541. How far, in cases where negligence is charged against the defendants, a court of equity will interfere by injunction, is not decided: *Clark v. Willett*, 35 Cal. 534.

No. 464.

Diverting Water from Flouring Mill.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was possessed of a flouring mill, situated on a certain creek known as the, in the Town of, County of, in this State.

II. That the water of the said creek was accustomed to flow into the said mill.

III. That on the day of, 187 , the defendant diverted the water of the said creek away from said mill, so that less water ran into it than before.

IV. That by reason thereof the plaintiff has been unable to grind more than barrels of flour per day, whereas, before the said diversion of water, he was able to grind barrels per day; to his damage in dollars.

[Demand of Judgment.]

60. Form.—See *Sands v. Trefuses*, Cro. Car. 575; Anon., Id. 500; see, also, *Haight v. Price*, 21 N. Y. 245.

61. Mills.—The grant of a mill carries with it raceways and conduits supplying the mill with water, and water rights essential to the enjoyment of the mill: 4 Kent's Com. 467; *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650; *Hall v. Lund*, 1 H. & C. 676; *Whitney v. Olney*, 3 Mason, 280; *United States v. Appleton*, 1 Sumn. 492; *Leonard v. White*, 7 Mass. 5; *Johnson v. Jordan*, 2 Met. 234; *Carbrey v. Willis*, 7 Allen, 369; *Oakley v. Stanley*, 5

Wend. 523; *LeRoy v. Platt*, 4 Paige, 77; *Farrar v. Stackpole*, 6 Greenlf. 154; *New Ipswich Fact. v. Bachelder*, 3 N. H. 190; *Pickering v. Stapler*, 5 S. & R. 107; *Elliott v. Sallee*, 14 Ohio St. 10; *Warren v. Blake*, 54 Me. 276; Washburn on Easements, 42-3. So a reservation of a mill from a grant would reserve easements essential to it in the land granted: *Pettee v. Hawes*, 13 Pick. 323.

No. 465.

i. *The Same—Diverting Water from Saw Mill.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff, before and at the time of the committing of the grievance hereinafter stated, was possessed of a certain water mill, called the.....saw mill, with the appurtenances, situated on.....creek [or river, orbrook], at, in the County of

II. That the said plaintiff had a right to use and employ all the water of said [creek, or river, or brook], running in its natural channel to said mill, without its being unreasonably retarded, or in any way obstructed and diverted therefrom.

III. That the said defendant did, on the.....day of, 187., dig up and remove the bank of said stream, and did divert a great part of the water thereof, so naturally running in said stream, from the bed of said [creek], and from the said mill of the said plaintiff, and hath from thence hitherto, and up to the commencement of this suit, kept up and continued the diversion of said water from the bed of said creek, and from the said mill of this plaintiff.

IV. That the said mill, before said diversion of the water of said creek, was able and used to saw.....thousand feet of lumber in every twenty-four hours; but by reason of said diversion of the water of said stream, now, and during the time aforesaid, the said mill is and was able to saw onlythousand feet of lumber in every twenty-four hours. By means whereof the said plaintiff has been deprived during all that time of the usual profits of his said mill, and still continues deprived thereof, to the damage of the said plaintiff in the sum of.....dollars.

[Demand of Judgment.]

NOTE.—The above form is, in substance, from Nash's (Ohio) Pl. & Pr. 208.

*No. 466.**For Erecting a Dam above Plaintiff's Dam.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the....day of....., 187..., and ever since that day, the plaintiff has been in the actual possession of an ancient grist-mill, situated on [state what stream] in [etc.], called [etc.], together with an ancient dam, to raise a head of water as high as should be necessary for said mill, and of the right to have the whole water of said stream, without obstruction or impediment, flow into and upon the pond for the benefit of said mill, as ancient rights and privileges, appurtenant to said mill.

II. That the defendant did, on the....day of....., 187..., erect a new dam across the said stream, above the plaintiff's dam aforesaid, within the limits of the plaintiff's pond and ground, and thereby cut off part of his said pond, backed the water above, and stopped its natural course as it anciently used to run; and that he still continues his new dam and obstruction, thereby frequently stopping the water from reaching the plaintiff's mill, and obliging the same to stand idle for want of water; and at other times letting out the water through said new dam so suddenly, and in such large quantities, as to tear away part of the plaintiff's said dam; whereby the plaintiff's mill aforesaid has become useless and of no value, to his damage in.....dollars.

[Demand of Judgment.]

62. Action, when it Lies.—To authorize the abatement of a dam on the ground of its being a nuisance, it must at the time it is abated be considered as a nuisance. The fears of persons, however reasonable, that a thing will become a nuisance, public or private, do not constitute an actionable nuisance, or one which may be abated: *Gates v. Blincoe*, 2 Dana (Ky.) 158. The thing complained of cannot be abated until it actually becomes a nuisance. Yet an erection may be a nuisance at a time when it is causing no actual damage: *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 56; see Ang. on Water-courses, 580.

63. Allegations.—The union, in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon Creek, * * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * * hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the

ground that it unites several distinct causes of action in one count: *Gale v. Tuolumne Water Co.*, 14 Cal. 25. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means is not important enough to require several counts: *Id.*

64. Right to Build.—The common law allows the owner of the soil over which a floatable but unnavigable stream flows, to build a dam across it, and erect a mill thereon, provided he makes a convenient and suitable passage-way for the public, by or through the dam: *Lancey v. Clifford*, 54 Me. 487.

No. 467.

For Backing up Water on Plaintiff's Quartz Mill.

[TITLE.]

The plaintiff complains, and alleges:

I. That before and at the time of the committing the injuries hereinafter mentioned, he was possessed of a certain quartz-mill, situate on Butte creek, in Butte County, in this State, and above the premises of the defendant hereinafter mentioned, and had the right to have the water flow from his said mill, and in the natural channel of said creek, without any obstruction whatever.

II. That on the day of, 187 . . ., the defendant erected a dam to a great height across the bed of said creek, and below the plaintiff's said mill, and ever since has kept the same up, and has thereby obstructed and stopped, during all that time, the natural flow of the water of said creek, and raised it in the bed of said creek, and backed it up upon the said mill and premises of the plaintiff, and upon the wheels and works of said mill, to wit, to the height of feet, thereby impeding and checking the natural flow of the water therefrom, and preventing the said water from carrying off the tailings from said mill, and otherwise impeding and preventing the operation of said mill, and diminishing the value thereof, to the damage of the plaintiff dollars.

[Demand of Judgment.]

65. Action—When it Lies.—An action to abate a nuisance in a highway, by water obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land: *Blanc v. Klumpke*, 29 Cal. 156. If a nuisance in a highway only affect the plaintiff in common with the public at large, in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same: *Id.* Injury to the naked right to have the water flow as it would naturally do, is sufficient to maintain the action: 16 Pick. 241; 12 Me. 407; 2 Story R. 661; 9 N. H. 88; 17 Conn. 288; 4 Barr, (Pa. R.) 486; 25 Me. 209; see Ang. on Water-courses, 142; 8 Ohio, 548.

66. Backing up Water.—Plaintiffs owned certain mining claims and quartz-lodes, on the banks of a stream, above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water upon plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz-mill which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained: *Harvey v. Chilton*, 11 Cal. 120.

67. Covenant in Deed.—If the purchaser of a mill seat and water power accepts from the vendor a deed, without any covenant for his protection as to the height of the dam or extent of flow to which he is entitled, and the purchaser is subject to an action of damage by reason of the improper height of the dam, he is without remedy either at law or in equity: *Ang. on Water-courses*, 557; *Hopper v. Lutkins*, 3 Green, (N. J.) Ch. 149.

68. Duty of Owner.—The owner of the dam is bound to so govern and control it that injury may not result to his neighbors: *Fraler v. Sears Union Water Co.*, 12 Cal. 555; see *Nevada Water Co. v. Powell*, 34 Cal. 109.

69. Injunction.—A perpetual injunction to restrain the defendants from raising their dam higher than the point designated was allowed: *Ramsey v. Chandler*, 3 Cal. 90. So, an injunction will be granted for the diversion of water from a stream: *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; where the injury is continuing: *Coker v. Simpson*, 7 Cal. 340; see *Rupley v. Welsh*, 23 Cal. 452.

70. Injury to Garden.—In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that, to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their own property; and that otherwise they had been guilty of gross negligence, and were liable in damages: *Held*, that although the instruction without the explanation was wrong, still with the explanation it was right, and could not have misled the jury: *Todd v. Cochell*, 17 Cal. 97.

71. Injury to Land and Crops.—Where defendants erected a dam, whereby the waters which during freshets found their way into the bay, across the land of the defendants, were diverted from their natural course, and made to flow upon the plaintiff's land, injuring the crops and rendering it unfit for cultivation, the dam is clearly a nuisance: *Castro v. Baily*, Cal. Sup. Ct., Oct. T., 1869; citing *Ashley v. Wolcott*, 11 Cush. 192; *Luther v. Winnisimmet Co.*, 9 Id. 171.

72. Ohio.—The use of streams of water for domestic, agricultural and manufacturing purposes being to some extent, *publici juris*, an action for a nuisance caused by any obstruction or diversion of the water of a stream for any such purpose will not lie, unless the damages occasioned thereby be real, material and substantial: *Cooper v. Hall*, 5 Ohio, 321; followed and approved in *McElroy v. Goble*, 6 Ohio St. 187.

73. Obstructing Flow of Tailings.—The plaintiffs allege that they are the owners of a certain mining claim, which claim cannot be worked with-

out the use of the cañon as an outlet for water and tailings; that the grade of the cañon is light, and that the defendants have erected and are maintaining a dam across the cañon at a point below their claim, which obstructs the flow of water and tailings to such an extent as to render the working of their claim impracticable. Upon an issue of title to the ground to entitle the plaintiffs to recover, it should have appeared: First. That the plaintiffs owned the ground; Second. That the dam prevented them from working it to advantage; Third. Alternatively, that the defendants had no title to the bed of the cañon, or if they had, that their right was subsequently acquired, or if prior, that the dam was not needed to enable the defendants to work to advantage: *Stone v. Bumpus*, 40 Cal. 430.

74. Overflowing Water Ditch.—A complaint which alleges that the plaintiffs were on a certain day the owners and proprietors of a certain valuable water ditch, for the purpose of conveying water, and at which time and place the defendants were also owners of a certain other ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so carelessly and negligently attended to, that said ditch broke away, and the water therein flowed over and upon the said ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage three thousand dollars, and thereof they bring suit, is sufficient: *Tuolumne County Wat. Co. v. Columbia & Stanislaus Wat. Co.*, 10 Cal. 195.

75. Overflowing of Dam and Ditch.—The overflowing of a dam is a nuisance: *Ramsay v. Chandler*, 3 Cal. 90. While a ditch by which the waters of a stream have been appropriated is out of repair, and not in a condition to carry any water, an action will not lie to abate as a nuisance a reservoir, constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to flow unequally: *Bear River & A. W. & M. Co. v. Boles*, No. 2, 24 Cal. 359.

76. Raising Dam.—Because an appropriator diverted the water of a stream by means of a dam and ditch, it does not necessarily follow that he had a right to raise his dam higher and higher, as occasion might require, to obviate obstruction in the use of the water in the manner of its said original appropriation: *Nevada Water Co. v. Powell*, 34 Cal. 109. In such cases, the question of his right must be subordinate to a subsequent appropriator. *Id.*

77. Relief.—Where plaintiff's mining claim was overflowed by means of a dam erected by the defendant, the decree should have ordered a reduction of the dam so as to prevent the overflow, or if necessary, its entire abatement: *Ramsay v. Chandler*, 3 Cal. 90.

78. Sufficient Averment.—In an action for damages, and for breaking defendant's dam, and flooding plaintiff's mining claim, where the complaint is in one count, and charges that "defendant's said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of said defendants, broke away," etc.: *Held*, that the complaint is sufficient: *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 416.

CHAPTER III.

PARTITION.

*No. 468.**i. For Partition of Real Property.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he and the defendants C. B. and D. B. are the owners as tenants in common [or joint tenants] of the following described real estate situate in the County of, to wit [insert full description]: and they are now in possession thereof.

II. That the plaintiff has an estate of inheritance therein to the extent of one undivided third part or interest in the fee thereof [or other estate], and that each of the said defendants C. B. and D. B. have a similar interest and estate therein, to wit: an undivided third part thereof [or other proportions according to the fact].

III. That there are no liens or incumbrances thereon appearing of record, and that no person other than the plaintiff and said defendants are interested in said premises as owners or otherwise.

Wherefore the plaintiff demands judgment:

1. For a partition of the said real property, according to the respective rights of the parties aforesaid; or if a partition cannot be had without material injury to those rights, then for a sale of the said premises, and a division of the proceeds between the parties, according to their rights.

*No. 469.**ii. For Partition of Real Property—Unknown Owner, Incumbrances, Etc.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he has an estate of inheritance, to the extent of the one undivided fourth part thereof, in fee, in the following described premises, situate in the County of, to wit: [insert description] and he is now in possession thereof.

II. That the defendants C. B. and D. B. each own the

one undivided fourth part of said lands and premises in fee, and are in possession of their said interests.

III. That one G. H., who in his life-time had an estate of inheritance therein of one undivided fourth interest in the fee, removed, several years ago, from this State to; that he subsequently married and had children, some of whom are now living, but their names and places of residence are wholly unknown to the plaintiff, and he cannot ascertain the same, or either of them, although he has made diligent inquiry for that purpose; that G. H. and his wife are now dead; and that said children, or the heirs at law of any who may be dead, are collectively entitled to the undivided fourth which appertained to the said G. H., and to which he would be entitled if now living.

IV. That the defendant L. M. holds a judgment duly given and made in the District Court, on or about the day of, 187., in a certain action then pending in said Court, wherein said L. M. was plaintiff and said defendant C. B. was defendant, for the sum of dollars, which judgment was on the day of, 187., docketed in said County of [the County where the premises are situated], and remains unpaid and unsatisfied of record.

V. That the defendant O. P. holds a mortgage upon the said interest of the said D. B. for dollars, payable on the day of, 187., with interest from the day of, 187., at per centum per annum, which said mortgage is recorded in the Recorder's office, in said County, in Book of Mortgages No., at page

VI. That no other incumbrances or liens upon said property appear of record, and no persons or persons other than those above named, and the unknown heirs of said G. H., are interested in said property.

Wherefore the plaintiff prays judgment:

1. That the amount of said several liens may be ascertained.

2. That a partition of the said real property be made, according to the rights of the respective parties, or if a partition cannot be had without material injury to those rights, then that said premises be sold and the proceeds applied—

1. To the payment of the general costs of this action.

2. To the costs of reference.

3. That the residue be paid to the several owners in proportion to their respective interests, except that from the interest of the said C. B. there be first paid the amount found due to said L. M. upon his said judgment; and from the interest of said D. B. there be first paid the amount due said O. P. under said mortgage; and that the interest belonging to the unknown heirs of said G. H. be invested, under the direction of the Court, in bonds of this State or of the United States, and for other proper relief.

1. Action of Partition.—The proceeding in partition is a special proceeding prescribed by the statute, and though errors in the course of the cause cannot be collaterally shown, yet so far as the rights of infants are involved, the court has no jurisdiction except over the matter of the partition: *Waterman v. Lawrence*, 19 Cal. 210. The object of the suit is to enable each party to obtain the title, and the use for all future time in severalty, of some definite portion of the property owned in common: *McGillivray v. Evans*, 27 Cal. 92. And when parties go into partition upon certain terms and conditions, the instrument of partition founded on certain releases is itself an affirmation of title and interest so as to estop a party thereto from subsequently denying interest and ownership in the property: *Tewksbury v. Provizzo*, 12 Cal. 20. The intention of the action of partition is to make one judgment in partition final and conclusive on all persons interested in the property or any part of it. Such actions partake more of the principles of equity than of law: *Gates v. Salmon*, 35 Cal. 576. If between the parties to an action for partition, disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined: *Morenhout v. Higuera*, 32 Cal. 289.

2. Allegations Essential.—Under the New York practice, the complaint must show that the plaintiff is in possession, actual or constructive: *Stryker v. Lynch*, 11 N.Y. Leg. Obs. 116. That plaintiff is possessed of an undisputed title to an undivided share in remainder, although there be an existing admitted life-estate covering the whole premises, is a sufficient allegation of the right of possession: *Blakely v. Calder*, 13 How. Pr. 476. The allegation that the parties were seised in common raises the presumption of possession: *Jenkins v. Van Schaack*, 3 Paige, 242; and see *Burhans v. Burhans*, 2 Barb. Ch. 398. And where a party was stated to be seised of a certain portion, it was construed to mean a seisin in fee: *Lucet v. Beekman*, 2 Cai. 385. The complaint must aver that the co-tenants hold and are in possession of real property as parceners, joint tenants, or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years: *Bradley v. Harkness*, 26 Cal. 76, Code C. P., sec. 752. If the complaint fails to sufficiently state the origin, nature and extent of the interests of the plaintiffs, the objection should be presented by demurrer, or it is waived: *Broad v. Broad*, 40 Cal. 495. If defendant has two deeds, each purporting to convey a certain interest, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff cannot prove it: *Miller v. Sharp*, 48 Id. 394. All the rights of the several parties, plaintiff as

well as defendant, must be put in issue, or they cannot be tried: *Id.* If expense has been necessarily incurred by the plaintiff, or any of the tenants in common in prosecuting or defending actions or proceedings for the protection, confirmation or perfecting the title, settling boundaries, making surveys, etc., such expense, except counsel fees, are allowed, with interest, but must be pleaded: See Code C. P., sec. 798.

3. Allegations Sufficient.—In a complaint to obtain partition of land, a general allegation that “the premises cannot be divided by metes and bounds without prejudice,” is sufficient, without an allegation of the facts upon which the plaintiff relies to obtain a particular mode of partition: *De Uprey v. De Uprey*, 27 Cal. 329. A complaint in partition is good which is silent upon the subject of the mode of partition: *Id.* If the court finds that the parties hold, and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life, or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them in the land: *De Uprey v. De Uprey*, 27 Cal. 331.

4. Community Property.—Where a community was formed making a common stock of property, and renouncing individual ownership, and became incorporated, the individual members of the community, or the heirs upon their death, were not entitled to a partition of the property: *Goesele v. Bimeler*, 14 How. U. S. 589; affirming 5 McLean, 223; and 8 West. Law J. 385.

5. Costs.—For costs, attorney’s fees, disbursements for the common benefit, abstract of title, etc., see Code C. P., secs. 796 to 801.

6. Deed Obtained by Fraud.—The question whether a deed was obtained by fraud cannot be considered in proceedings for partition; it must be sent to a court of law for trial: *McCall v. Carpenter*, 18 How. U. S. 297. Plaintiff sues defendant for partition. The court orders a sale of the property and distribution of the proceeds. After the sale, G. files a petition, stating that he is the creditor of one F. M. H., not plaintiff, and has an attachment lien on the interest of said F. M. H., in the property sold; that said property, in fact, belonged to F. M. H., and that any conveyances of the same from him to plaintiff were merely colorable, for the use and benefit of F. M. H., and made to hinder, delay, and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff; court refused: *Held*, that there was no error, the petition of G. being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. H., and that the charges of fraud are too general, and do not state the specific facts constituting the fraud: *Harris v. Taylor*, 15 Cal. 348.

7. Easements.—The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement: Civil Code, sec. 803. In case of partition of the dominant tenement the burden must be apportioned according to the division of the dominant tenement, but not in such way as to increase the burden upon the servient tenement: *Id.* sec. 807.

8. Homestead.—On a partition of lands held by tenants in common, if one of them has a homestead claim on it, his undivided interest will be set

apart to satisfy the homestead claim, but not to exceed the legal value of a homestead: *Higgins v. Higgins*, 46 Cal. 259.

9. Incumbrances.—If it appear to the court that there are outstanding liens or incumbrances of record, and which were of record at the time of the commencement of the action, and such persons have not been made parties, the court must order them to be made parties, or appoint a referee to ascertain whether such liens have been paid, and if not paid, the amount that remains due thereon, and whether the same has been secured, and the nature and extent of the security: Code C. P., sec. 761. For notice to lien holders, and proceedings before the referee, see Id. sec. 762. Where a lien is on an undivided interest, such lien, if partition be made, shall only be a charge upon the part assigned to the debtor, but such share must be charged with its proportion of the costs, in preference to the lien: Code C. P., sec. 769. Where there are other securities, see Id. 772.

10. Interest of Parties.—The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff: Cal. Code C. P., sec. 753. When mining land is claimed and possessed by joint tenants, tenants in common, or copartners, or even partners, their interests are in the nature of an inheritance, and may be partitioned as real property: *Hughes v. Devlin*, 23 Cal. 501. Where, in an action for partition, all necessary parties have been joined, any error in stating the interest and shares of the parties, or any omission to state what the plaintiff might have been compelled on motion to insert, is not an irregularity which can affect the title: *Noble v. Cromwell*, 27 How. Pr. 289; affirming S. C., 26 Barb. 475.

11. Interests Contingent.—If one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint: Cal. Code C. P., sec. 753. The complaint should set forth the nature of such contingent interest: *Van Cortlandt v. Beekman*, 6 Paige, 492.

12. Judgment, Effect of.—The judgment in an action for partition, merely severs the unity of possession, but does not vest in either co-tenant any new or additional title: *Wade v. Deray*, 50 Cal. 376. The order for partition is not a final judgment, it is followed by a judgment confirming the partition or sale: *Hastings v. Cunningham*, 35 Id. 552; see Code C. P., sec. 766. The court can order a partition to be made, but it cannot make the partition except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition: *Dondero v. Van Sickle*, 11 Nev. 389. A decree ordering a partition of certain personal property not mentioned in the pleadings, is clearly erroneous: Id.

13. Land Formed by Accretion.—In apportioning to proprietors their respective shares of an alluvial accretion, the whole length along the shore of the alluvian shall be first found, and it shall then be divided among the proprietors of the upland in proportion to their shore line: *Jones v. Johnston*, 18 How. U. S. 150.

14. Legacies.—Any heir, devisee, or legatee, after the lapse of four months after issuance of letters testamentary, may petition the court to have

the legacy or share of the estate given to him on his giving bonds for his proportion of the debts of the estate: Cal. Code C. P., sec. 1658. As to the proceedings thereon, consult Cal. Code C. P., secs. 1658 to 1662, inclusive.

15. Lien-holders.—No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record: Cal. Code C. P., sec. 754. A judgment-creditor of a deceased person is not entitled to be made a party to a partition suit: *Waring v. Waring*, 3 Abb. Pr. 246. But the complaint may state that one of the defendants claims a specific lien on the premises, and ask for an accounting: *Bogardus v. Parker*, 7 How. Pr. 305. Where there are outstanding liens or incumbrances of record upon such real property, or any portion thereof, existing at the commencement of the action, the persons holding such liens may be made parties to the action: Cal. Code C. P., sec. 761.

16. Married Woman.—A married woman whose husband is sued in partition, is a necessary party, if she claims a homestead right to or an interest in the property in dispute: *De Uprey v. De Uprey*, 27 Cal. 331. That a wife should be co-plaintiff with her husband in such actions: *Ripple v. Gilborn*, 8 How. Pr. 456; *Brownson v. Gifford*, Id. 389. But a widow, though a proper, is not a necessary party. And a judgment which makes not a sale, but actual partition, in no way affects her interests, and should not be disturbed upon her motion to set aside for irregularity: *Gordon v. Sterling*, 13 How. Pr. 405; and see *Ash v. Cook*, 3 Abb. Pr. 389; *Tanner v. Niles*, 1 Barb. 560; compare *Ripple v. Gilborn*, 8 How. Pr. 456.

17. Mining Claim.—The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for partition of real property, which are not denied by the answer, are deemed admitted for the purpose of the trial: *Hughes v. Devlin*, 23 Cal. 501. Where two thirds of a quartz-mill and mine were owned by M. and S., while the other third was owned by C. and Y., and the profits and losses of the entire claim were shared in this proportion, M. and S. conveyed by deed their interest to R., who entered into and remained in possession of the same, a small portion only of the purchase-money being paid down by R. After this conveyance a suit was instituted against M., S., C. and Y. for a debt due by the company, contracted before the conveyance, and judgment was passed against them, and all their right, title and interest were sold to H., who in due course received a sheriff's deed, under and by virtue of which he thereafter claimed to own all said property. In an action by R. against H. to quiet title, it was held that R. acquired under said deed from M. and S. the title to the two thirds undivided interest, and H. acquired by said sheriff's deed only the one third undivided interest of C. and Y.: *Ross v. Heintzen*, 36 Cal. 313.

18. Mortgage.—It is not sufficient to aver merely that the defendant claims an interest adverse to the plaintiff, but the nature of the claim should be set out: *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116. The plaintiff cannot foreclose a mortgage which he holds on defendant's interest in the property, and cut off defendant's equity of redemption by an absolute sale, as in partition: *Bradley v. Harkness*, 26 Cal. 76.

19. New Trial.—If there is error in an interlocutory decree in partition, it must be corrected by a motion for a new trial, or by an appeal as in other cases: *Tormey v. Allen*, 45 Cal. 119; *Regan v. McMahon*, 43 Id. 625.

20. Notice—Lis Pendens.—Immediately after filing the complaint, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action: Cal. Code C. P., sec. 755.

21. Parol Partition.—In general, a valid partition of lands cannot be made by parol, such case being within the statute of frauds. But a parol partition may be made of lands held under a trust arising by implication of law: *Dow v. Jewell*, 18 N. H. 340. And a parol partition, valid as between the parties, may be ratified by others interested in the land: Id. Family arrangements are to be regarded with favor, and a parol partition among heirs, if fairly made, is binding even upon *femes covert*, if they are parties to it, and assent to the arrangement; but only when it has been agreed to by all the joint owners, and when it has been executed: *McConnell v. Carey*, 48 Penn. 345.

22. Parol Partition, how Made.—A parol partition of land may be made by co-owners under the Mexican law, as well as by tenants in common under the common law: *Long v. Dollarhide*, 24 Cal. 222. In order to uphold a parol partition under both the Spanish and common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed up by a several possession, by either the parties themselves or their grantees: Id. An agreement to establish a partition line between the occupants of adjoining tracts of land is of no validity. In order to render such agreement for a partition line effectual, each party must have the title to and right to dispose of the tract claimed by him; or, in other words, they must be coterminous proprietors: *Carpentier v. Thirston*, 24 Cal. 280. A parol partition of land owned by tenants in common could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty: *Elias v. Verdugo*, 27 Cal. 420.

23. Partial Partition.—When in the opinion of the court, a complete partition would be impracticable or inconvenient, a partial partition may be made: See Cal. Code C. P., sec. 760. Where commissioners in the partition and allotment failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide it, or that the allotments made would in any degree have been affected by the allotment of this, or that any injury resulted to any one interested in consequence of this omission, and where important rights have vested under the partition, this court would not be warranted in holding the action of the commissioners void because of their failure to divide and allot the marsh land: *Tewksbury v. Provizzo*, 12 Cal. 20.

24. Parties.—When several co-tenants hold and are in possession of real property, as parceners, joint tenants, or tenants in common, in which one or

more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof: Cal. Code C. P., sec. 752. A partition among tenants in common must be made as to the whole tract. One tenant in common cannot have partition of a part only of the common property, and have his entire interest located on this part: *Sutter v. San Francisco*, 36 Cal. 112. A tenant in common of part of a tract of land is a proper party in a suit for the partition of the whole. The real parties in interest should be joined in partition, and the holder of a special tract, as well as the co-tenants of his grantor, should be made parties to the action: *Gates v. Salmon*, 35 Cal. 576; *Hathaway v. De Soto*, 21 Cal. 194; see, also, *Sutter v. San Francisco*, *supra*. Neither the administrator nor the creditors of an intestate are necessary or proper parties to a bill for partition between the heirs of the estate of the intestate, even if his personal property is insufficient to pay his debts: *Speer v. Speer*, 1 McCarter (N. J.) 240. The several parties to an action of partition, so far as its ultimate purpose is concerned, to wit, a partition, are all actors or plaintiffs, each against each and all others, and it is in this respect a matter of no consequence whether they appear upon the face of the record in the technical attitude of plaintiffs or defendants: *Morenhout v. Higuera*, 32 Cal. 295.

25. Partition by Attorney.—A power of attorney which authorizes the attorney to sell the lands of the constituent, and to do whatever is necessary to carry the power into execution, does not authorize the attorney to make partition of lands in which the constituent has an interest as a tenant in common: *Borel v. Rollins*, 30 Cal. 408. But if an attorney in fact, whose power does not authorize him to make partition of the lands of his principal, does make such a partition, the principal may afterwards give effect and confirmation to the partition so made by the execution of deeds of conveyance: *Id.*

26. Partition by Deed.—Where a deed of partition is invalid as a conveyance, by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms, and dealing with their respective parts as if owned in severalty; but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries, and only upon the interests of those performing them. A party who signed the deed is not estopped from insisting upon its invalidity by reason of any acts of ratification, either of the others who did execute or of those who failed to execute: *Tewksbury v. O'Connell*, 21 Cal. 60. A contract between A. and B., tenants in common, by which it is agreed that B.'s interest in the land shall be a certain amount in excess of what he otherwise owned, and that B. shall extinguish all claim of title in the land set up by C., by procuring C.'s deed, and that after certain other events transpire a division of the land shall take place between the contracting parties, and deeds be exchanged, is not fulfilled by B. having procured C.'s deed *before* the contract was made, nor by procuring C.'s deed to himself, unless he then conveys it to A.: *Porter v. Atherton*, 32 Cal. 416; even though C. had no valid title to the land: *Id.* A conveyance by one tenant in common, or any number less than the whole, of a specific portion of the common lands, is not void, but cannot be made to the prejudice of the tenants not uniting in the conveyance: *Gates v. Salmon*, 35 Cal. 576.

27. Partition not Presumed.—A partition by judicial decree among tenants in common, will not be presumed to have been made from lapse of time, occupancy in severalty, and the destruction of the records of a court which had jurisdiction to make such partition, against a tenant who married while under age, and whose coverture continued until shortly before suit brought: *Weatherhead v. Baskerville*, 11 How. U. S. 330.

28. Partition without Action.—Where a deed of partition, executed by a number of tenants in common, by the terms of which each party conveyed and released his undivided interest in the whole in consideration of the conveyance to him of the undivided interests of others to specified portions, if the deed was not executed by all, the deed was void as to those who did not sign: *Tewksbury v. O'Connell*, 21 Cal. 60. But it may become effectual by the parties taking and holding in severalty under its terms: *Id.* The general guardian of an infant or insane person, or person incapable of conducting his own affairs, may, if he would be a proper party to an action for partition, agree to partition without action: See Code C. P., sec. 795; also, 1722, 1747-1809.

29. Referee.—The court may appoint a referee to ascertain whether liens or incumbrances have been paid, or what amount remains due thereon, or whether the amounts due have been secured, and the nature and extent of the security: Cal. Code C. P., sec. 761. And notice of such hearing before the referee shall be served upon such lienholders: *Id.* sec. 762; consult, also, *Waterman v. Lawrence*, 19 Cal. 210; *Hathaway v. De Soto*, 21 *Id.* 191; *Morenhout v. Higuera*, 32 Cal. 289; *Sutter v. San Francisco*, 36 Cal. 112. The effect of a judgment in partition is to be determined by our statute, and not by the common law: *Id.* With the consent of the parties, the court may appoint a single referee to make partition instead of three: Code C. P., sec. 797.

30. Repts and Profits.—One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his co-tenant in possession to account for rents and profits received by him from tenants of the premises: *Goodenow v. Ewer*, 16 Cal. 461. If one of several tenants in common lease a portion of the common property to a tenant, and after the lease is made, suit for partition is commenced, and a decree entered which assigns to another of the tenants in common the land so leased, the decree does not pass to the latter the rent of the leased land unless such rent falls due after the decree is made: *Mahoney v. Alviso*, 51 Cal. 440; *Mahoney v. Aurecochea*, *Id.* 429.

31. Rights of Parties.—The right of partition existing in the co-tenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him: *Stark v. Barrett*, 15 Cal. 361. The right of the several parties plaintiff as well as defendant, may be put in issue, tried and determined in this action: Cal. Code C. P., sec. 759. Several tenants in common may elect to consider their rights as an undivided share belonging to them all, and institute a petition for partition among themselves, and the other tenants in common: *Ladd v. Perley*, 18 N. H. 395. Under our practice any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue: *De Uprey v. De Uprey*, 27 Cal. 331. And if disputes exist as to their rights or interest in any

respect, such disputes may be litigated and determined: *Morenhout v. Higuera*, 32 Cal. 289; cited as authority in *Sutter v. San Francisco*, 36 Cal. 112.

32. Remainder.—Where it is uncertain to whom and in what proportions a remainder may descend after the termination of a life estate, a judgment in partition made before the life estate terminates should not ascertain the interest of those holding in remainder, but should allot the life estate subject to the remainder: *Regan v. McMahon*, 41 Cal. 679.

33. Rule in Respect to Improvements.—In an action for partition by one tenant in common, of lands granted his co-tenants, where the tenants have severally made valuable improvements on distinct portions of the land sought to be partitioned, the court, by way of interlocutory decree, ordered that there be set off to the several parties such portions of the premises as will include their respective improvements, provided that the rights or interests of neither of the other parties be prejudiced thereby: *Held*, to be the proper rule: *Seale v. Soto*, 35 Cal. 102.

34. Specific Tract.—Where one or more of the tenants in common has sold and conveyed to another a specific tract by metes and bounds out of the common land, the land described in such deed shall be set apart to the purchaser, if it can be done without material injury to the rights and interests of the other co-tenants: see Code C. P., sec. 764, and *Gates v. Salmon*, 35 Cal. 576; *Seale v. Soto*, Id. 102.

35. Summons.—The summons must be directed to all the joint tenants, and tenants in common, and all persons having any interest in, or any liens of record upon, the property, or any portion thereof, and generally to all persons unknown who have or claim any interest in the property: Cal. Code C. P. sec. 756. And unknown parties or absentees from the state, may be served by publication, upon affidavit showing such facts, the summons in such case to be accompanied by a brief description of the property: Id. sec. 757.

36. Title.—In the New York practice it is not necessary to state the sources of title in the complaint: 2 Van Santv. Eq. Pr. 17; *Bradshaw v. Callaghan*, 8 Johns. 558. But a complaint in an action for partition is fatally defective, if it shows that the legal title is in a third person as trustee: *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116. That title may be tried in this action, see *De Uprey v. De Uprey*, 27 Cal. 329; *Morenhout v. Higuera*, 32 Cal. 289; affirmed in *Bollo v. Navarro*, 33 Cal. 259; see *Sutter v. San Francisco*, 36 Cal. 112.

37. Water Rights.—Water flowing in ditches cannot be partitioned. It may be sold, and the proceeds be subject to distribution: *McGillivray v. Evans*, 27 Cal. 96. The only partition that can be made is to order a sale, and distribution of the proceeds. In an action for partition of a water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interests of his co-tenants, that can be adjusted in the action, by an application of the proceeds of the mortgagor's interest towards the payment of the same: *Bradley v. Harkness*, 26 Cal. 69.

38. Ways—Streets.—Before making partition the referees may set apart a portion of the property for a way, road or street, and such portion shall not be assigned to any of the parties or sold, but shall remain an open public way, road or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment

of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways: Code C. P. sec. 764.

39. When Action will Lie.—The action may be brought for a partition by one or more, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners: Cal. Code C. P. sec. 752. A mere desire of one of the tenants in common, is sufficient to authorize the courts to dissolve the relations existing between them: *Bradley v. Harkness*, 26 Cal. 69.

40. When Action will not Lie.—A petition for partition against an executor for a filial portion, etc., will not lie for money or other property delivered by him to a legatee for life: *Billups v. Riddick*, 8 Jones L. (N. C.) 163. Where a tenant in common ousts his co-tenant, remaining in sole possession, and subsequently purchases an outstanding title, the co-tenant cannot maintain an action for partition or for the benefit of the purchase until he has regained possession: *Rozier v. Johnson*, 35 Mo. 326.

No. 470.

iii. *By a Tenant in Common or a Joint Tenant, against a Co-tenant who has Wasted the Estate.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is a tenant in common [or joint tenant] with the defendant, of [describe the property].

II. That [each of them] is entitled to an undivided [half] of the same.

III. That between the day of, 187 , and the day of, 187., the defendant committed great waste upon the same [cutting down many valuable forest trees, or otherwise specify acts of waste], without the consent of the plaintiff.

Wherefore the plaintiff demands judgment:

1. For dollars damages.

2. For a partition of the said premises in such manner as to compensate him for such damages.

41. Relief.—The plaintiff can have this relief in the State of New York: 3 N. Y. R. S. (6th ed.), 599. This form is from the New York Code Commissioners' Book of Forms.

CHAPTER IV.

QUIETING TITLE.

No. 471.

i. For Determination of Claims to Real Property.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. is now deceased, and at the time of his death was seised in fee-simple of certain real property in the town of, county of, bounded as follows: [description.]

II. That in his life-time the said A. B. made and published his last will and testament, whereby he devised to the plaintiff all his said property.

III. That the said A. B. died on the day of, 187., at

IV. That the said property is now, and has been, for the years last past, in the actual possession of the plaintiff [or is now, and has been, for the years last past, in the actual possession of the plaintiff, and was, during the years immediately preceding that period, in the actual possession of the said deceased].

V. That the defendant unjustly claims an estate or interest [state what] in said property.

Wherefore, the plaintiff demands judgment:

I. That the defendant be forever barred from all claim to any estate of inheritance or freehold in the said property.

1. **Abatement.**—The pendency of an action to quiet title to land will not abate a subsequent action between the same parties, to recover possession of the same land in which the same facts are litigated: *Bolton v. Landers* (No. 1), 27 Cal. 104.

2. **Action to Quiet Title.**—The object of this action is to determine an estate held adversely to the plaintiff, to remove what would otherwise be a cloud upon his own title: *Boggs v. Merced Mining Co.*, 14 Cal. 279. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise not: *Pixley v. Huggins*, 15 Cal. 128; *Lick v. Ray*, 43 Id. 84. This action embraces every description of claim, whereby the plaintiff might be deprived of the property,

or its title be clouded, or its value depreciated, or whereby he might be incommoded, or damnified by the assertion of an outstanding title already held, or to grow out of the adverse pretension: *Head v. Fordyce*, 17 Cal. 149. On the subject of cancellation of instruments, see Cal. Civ. Code, secs. 3412 to 3414.

3. Action, when it Lies.—Where an instrument is outstanding against a party, which is void, or an unfounded claim is set up, which he has some reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, equity will interfere and grant the appropriate relief: 21 Conn. 488; 19 N. H. 91; 1 Hemp. 692; 13 Pet. 203; 18 N. Y. 515; *Ward v. Chamberlain*, 2 Black, 430. But a tax-deed based upon an assessment made under an unconstitutional act of the Legislature will not constitute a cloud upon title: *Williams v. Corcoran*, 46 Cal. 553; *Wills v. Austin*, Cal. Sup. Court, July Term, 1878; *Minturn v. Smith*, 3 Sawyer, 142; *Detroit v. Martin*, 34 Mich. 170. In Massachusetts a petition will not lie on behalf of the assignee, for an insolvent debtor to compel a prior mortgagee from the same debtor to bring an action to test the validity of a mortgage: *Hill v. Andrews*, 12 Cush. 185; *Dewey v. Bulkley*, 1 Gray, 416. Nor will a citizen of another State, or a foreign country, be ordered to bring an action, to try his title to real estate in Massachusetts, on the petition of a party in possession: *Macomber v. Jaffray*, 4 Gray, 82; see 4 Allen, 150. This action lies where an adverse claim is *prima facie* sustainable, though actually bad, as it constitutes a cloud: *Tisdale v. Jones*, 38 Barb. 523. It may be maintained for the satisfaction upon the record of judgments, apparently liens, but in fact paid: *Shaw v. Dwight*, 27 N. Y. 244; for the discharge from the record of a mortgage, claimed to be satisfied: *Beach v. Coke*, 28 N. Y. 508; and for the extinguishment of a widow's *prima facie* claim to dower: *Wood v. Seeley*, 32 N. Y. 105.

4. Action will not Lie.—A suit for this purpose will not lie where the facts alleged, if true, would not legally affect the plaintiff's title: *Farnham v. Campbell*, 34 N. Y. 480; *Hotchkiss v. Elting*, 36 Barb. 38; *Johnson v. Crane*, 40 Id. 78; *Butler v. Viele*, 44 Id. 166. Nor will allegations of mere threats, assertions or designs to disturb the possession of the grantee, avail to sustain this form of relief: *Madison Av. Baptist Church v. Viele*, 26 How. Pr. 72. It is not enough that the deed, sought to be set aside may possibly be a cloud on plaintiff's title, but it must clearly appear that the claim set up under such deed, is, in fact, in hostility to the plaintiff's title: *Hartman v. Reed*, 50 Cal. 484.

5. Adverse Possession.—Adverse possession which will set the statute of limitations running is of two kinds: First. Where possession is taken without color of title, but with intent to claim the fee against all comers; Second. Where possession is taken under a claim of title, founded on a written instrument or judgment of a court of competent jurisdiction: *Kimball v. Lohmas*, 31 Cal. 154; see, also, 28 Cal. 605. Actual adverse and undisturbed possession of land, for a period exceeding the time prescribed by statute for the enforcement of a right of entry, gives to the possessor a right of undisturbed enjoyment equivalent to a perfect title: *Simson v. Eckstein*, 22 Cal. 580; *Le Roy v. Rogers*, 30 Id. 229; see, also, Cal. Code C. P., secs. 323 to 326. An open, notorious, exclusive adverse possession for twenty years would operate to convey a complete title to the plaintiff, as much so as any written

conveyance, a title of the highest character, the absolute dominion over it: *Leffingwell v. Warren*, 2 Black, 605; to the same effect, *Stokes v. Berry*, 2 Salk. 421; *Drayton v. Marshall*, Rice Eq. 385; *Jackson v. Rightmeyer*, 16 Johns. 327; *Bradstreet v. Huntington*, 5 Pet. 438; *Thompson v. Green*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Chiles v. Jones*, 4 Dana, 483; *Alexander v. Pendleton*, 8 Cranch, 462; see *Arrington v. Liscom*, 34 Cal. 381, and cases there cited.

6. Averments in Complaint.—In an action brought by one in possession of land, to try and determine an adverse claim set up by one out of possession, when the complaint avers that the defendant sets up an adverse claim, without stating what it is, and the answer admits plaintiff's possession, and sets up the particulars of the defendant's alleged title, the burden of proof is cast upon the defendant: *Crook v. Forsyth*, 30 Cal. 662. Action to determine an adverse claim to land, the complaint averring that the plaintiff, who was in possession, deraigned title through a deed from G. Answer, that previous to the execution of G.'s deed, the land was attached at suit of a creditor of his, and was subsequently in due course sold by the sheriff, at which sale defendant became the purchaser. Replication, that a portion of the debt, on which the attachment issued, was secured by a collateral note, and that the attachment was therefore void: *Held*, that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided), the burden of the proof was on him to show that the attachment debt was collaterally secured: *Bostwick v. McCorkle*, 22 Cal. 669. A complaint which alleges that plaintiff owns the land in fee, and that defendant is making an unfounded claim of title thereto, sufficiently shows that defendant's claim of title is "adverse" to plaintiff: *Gillett v. Carshaw*, 50 Ind. 381.

7. Cancellation of Deed.—Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase-money therefor is paid, and the money is afterwards fraudulently attached, in a suit brought by the real, though not ostensible purchaser, against the husband alone: *Held*, that equity will compel a cancellation of the deed so obtained: *Still v. Saunders*, 8 Cal. 281.

8. Cause of Action.—As to what are the facts necessary to constitute the cause of action, see the provisions of the statute: Cal. Code C. P., sec. 738. In New York: 3 Rev. Stat. (6th ed.) 1875, p. 579 *et seq.*; *Hager v. Hager*, 38 Barb. 92. So, where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled: *Shattuck v. Carson*, 2 Cal. 589. Or it will interfere and prevent a sale, and the consequent execution of an improper deed: *Id.*

9. Clouds on Title.—Every deed from the same source through which plaintiff derives his real property, if valid on its face, is a cloud on the title: *Pixley v. Huggins*, 15 Cal. 127. A sale by an administrator without an order by probate court, or under an order void for want of jurisdiction, constitutes no cloud: *Florence v. Paschal*, 50 Ala. 28. A sale by a sheriff, of real estate, upon an execution, against the grantor, will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale: *Englund v. Lewis*, 25 Cal. 337. And a sheriff's deed upon an execu-

tion sale would have the same effect in casting a cloud as a deed made directly by the vendor: *Id.*: *Alverson v. Jones*, 10 Cal. 9. So, when a homestead was sold by the sheriff: *Riley v. Pehl*, 23 Id. 70. So, a sale by an administrator of land, once the property of the intestate, but sold during his life-time, will cast a cloud on the intestate's prior grantee's title: *Thompson v. Lynch*, 29 Id. 189. An apparently good record title to land constitutes a cloud on the title thereof which has been subsequently acquired by adverse possession under the statute of limitations: *Arrington v. Liscom*, 34 Id. 365. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded on the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist, otherwise not: *Pixley v. Huggins*, 15 Id. 127. An order of a board of supervisors, laying out a road, which is unconstitutional, and null and void upon its face, does not affect or cloud the title to the land over which it passes: *Leach v. Day*, 27 Id. 643.

10. Confirmation of Surveys.—The system of locating by final survey Mexican and Spanish grants of land in California, under the act of congress of March 3, 1851, was essentially modified by the act of congress of June 14, 1860. The proceedings had under this act after the return of the survey and plot into the district court, are strictly judicial in their character, and the decree rendered thereon is final and conclusive to all parties to it. If after a decree confirming a survey, a decree is made confirming a survey of another prior grant covering the same land, and the confirmer in the first decree is a party to the second decree, consenting thereto, he is bound by it: *Treadway v. Semple*, 28 Cal. 661; *Waterman v. Smith*, 13 Cal. 373; *Semple v. Wright*, 32 Cal. 659; cited in *Yates v. Smith*, 38 Cal. 60; decided on the authority of *Rodriguez v. United States*, 1 Wall. U. S. 587; see, also, *Toland v. Mandell*, 38 Cal. 30.

11. Description.—In case of a lease of a lot by its number, followed by a description by metes and bounds, which included lands which the lessor never owned, the description by metes and bounds was rejected, and the one by number was taken as the true description: *Lush v. Druse*, 4 Wend. 313; followed in *Piper v. True*, 36 Cal. 606. Where the first and third calls of a deed are general, and the second, fourth, and fifth calls are particular, the latter are not restrictions or limitations on the former where they have been used simply as reiteration or affirmation: *Id.*

12. Disclaimer.—If the defendant disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs: Cal. Code C. P., sec. 739.

13. Equal Equities.—Where the equities are equal the legal title must prevail: *Maina v. Elliott*, 51 Cal. 8.

14. Facts to be Alleged.—In an action to remove a cloud, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument would not ordinarily be sufficient, but where the instrument is a tax deed, we think the name sufficient for the purpose of showing its apparent validity: *Hibernia Sav. and Loan Society v. Ordway*, 38 Cal. 679. A tax deed, however, founded on an assessment levied under an

unconstitutional act of the legislature, constitutes no cloud: *Williams v. Corcoran*, 46 Cal. 553; *Wills v. Austin*, Cal. Sup. Ct., July T., 1878; *Minturn v. Smith*, 3 Saw. 142. But in Oregon held otherwise: *Tilton v. O. C. M. R. Co.*, 3 Saw. 22.

15. Injunction.—As to when injunction will be issued to restrain a sale of lands which would cast a cloud on plaintiff's title, see "Injunction," *post*.

16. Jurisdiction.—A court of equity has jurisdiction at the suit of the judgment-creditor, who has purchased land at sheriff's sale, and received a sheriff's deed therefor, to annul and set aside, as a cloud upon title, a deed of the land given to defraud the creditor before the recovery of judgment: *Hager v. Shindler*, 29 Cal. 47. The courts of the United States may entertain jurisdiction in chancery, to grant perpetual injunctions for quieting inheritances, after the title has been fairly settled: *Wickliffe v. Owings*, 17 How. U. S. 47. And citizens of other states have a right to come into such courts, to have the rights secured them under the laws of states where the land is situated, protecting individual rights to the soil of such states, enforced: *Clark v. Smith*, 13 Pet. 195; *Parker v. Overman*, 18 How. U. S. 137; *Bayerque v. Cohen*, 1 McAll. 113.

17. Laid Out in Lots.—Where land has been laid out in lots, and divided among many occupants, a bill will lie, although complainants had a legal title and a remedy at law in each several case: *Crews v. Burcham*, 1 Black, 352.

18. Land Bounded by River.—In an action to determine the adverse claim to land lying on both sides of a river, if the plaintiff shows a right to only that portion of the land on the north side of the river, he is not entitled to recover with respect to that located on the south side: *Van Vleet v. Olin*, 4 Nev. 95.

19. Limitations, Statute of.—Adverse possession of land for the time required by the statute of limitations, gives an absolute right to the party in possession, and entitles him to all the remedies given by the law to quiet his possession. He may, therefore, maintain an action against the party having the record title, to have the same declared void: *Arrington v. Liscom*, 34 Cal. 365.

20. Location on State Lands.—No right of the locator on state lands under the statute of California, of April 27, 1863 (Stats. 1863, p. 591), inchoate or otherwise, attaches, till the certificate of the oath prescribed by the twenty-eighth section, indorsed on a description of the land, is filed in the office of the county recorder: *Dunn v. Ketchum*, 38 Cal. 93.

21. Mining Claims.—Mining claims fall within the operation of section 254 of the California Practice Act: Code C. P., sec. 738; *Merced Mining Co. v. Fremont*, 7 Cal. 319. To quiet title to quartz mining claim, located on the public lands of the United States, a possessory title thereto is sufficient to maintain the action by a party in possession as against one out of possession: *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30. The eleventh section of the act of March, 1856, "For the protection of actual settlers, and to quiet land titles in this state" (California) does not apply to miners engaged in simply extracting gold from a quartz vein. They are not "settled upon" in the sense of the statute, and the two years' limitation of the eleventh section cannot avail them: *Fremont v. Seals*, 18 Cal. 435. This section only applies

to actions brought to recover the possession of lands, after the issuance of a patent: *Morton v. Folger*, 15 Cal. 275. F., defendant, began suit against the Volcano Water and Mining Company, to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanic's lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one H., and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed, and in due time received the sheriff's deed. Afterward, F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues to quiet title, alleging that F.'s decree is fraudulent, that he had no lien, and that he is about enforcing the decree, which is a cloud on plaintiff's title: *Held*, that aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title: *Head v. Fordyce*, 17 Cal. 149.

22. Municipal Corporation.—A municipal corporation cannot invoke the aid of a court of equity to set aside a grant made by its authorities, when the grant is void. Such a grant being a nullity, casts no cloud upon the title of the corporation: *Oakland v. Carpentier*, 21 Cal. 642.

23 Notice.—In an action to quiet title, against parties claiming from the same source of title through a prior unrecorded conveyance, it is necessary to aver want of notice of the conveyance: *Lawton v. Gordon*, 34 Cal. 36.

24. Parties.—An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim: Cal. Code C. P. sec. 738; *Horn v. Jones*, 28 Cal. 194. But it cannot be maintained by a landlord against his tenant in possession, for the purpose of determining the validity of an adverse title set up by the tenant: *Van Winkle v. Hinkle*, 21 Cal. 342. Until administration of an estate is ended, an administrator is the proper party plaintiff in an action to quiet title to the estate: *Curtis v. Sutter*, 15 Cal. 259. But under sec. 1452, Cal. Code C. P., heirs or devisees may, themselves or jointly with the executor or administrator, maintain the action against any one but the executor or administrator. One tenant in common of real property may maintain an action to determine the validity of an adverse claim of title thereto by a co-tenant: *Ross v. Heintzen*, 36 Cal. 313. If neither party has title to the land neither is entitled to a judgment against the other: *City of San Diego v. Allison*, 46 Cal. 162.

25. Parties Defendant.—Any person in possession may bring this action against any party who claims an estate or interest adverse to him: *Merced Mining Co. v. Fremont*, 7 Cal. 319. And the action may be brought by the party in possession, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained: *Merced Mining Co. v. Fremont*, 7 Cal. 319; *Curtis v. Sutter*, 15 Cal. 259. An action cannot be maintained against the street commissioner of an incorporated city to quiet title to land alleged to be a public street or highway. The acts of such officer in opening streets are the acts of the city: *Leet v. Rider*, 48 Cal. 623.

26. Possession.—Under section 254 of the former Practice Act, it was necessary for the plaintiff to allege and prove possession by himself; but that is not now necessary under Cal. Code C. P., sec. 738.

27. Possession of Part.—Where suit is brought under section 254 of the Practice Act to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyance would not cloud plaintiff's title. And if the grantees under such conveyance should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample: *Curtis v. Sutter*, 15 Cal. 259. Where the plaintiff for some years lived upon and occupied a part of the land, claiming the whole, while there is no other party in adverse possession of the part in controversy, this extended his possession to the bounds of the deed within the case of *Hicks v. Coleman*, 25 Cal. 132.

28. Public Lands.—Congress has power to withdraw the public lands from pre-emption and sale under the general laws, at any time before the acquisition by the settler of a right to the lands, *that he could maintain against the United States, so as to secure ultimately the legal title*: *Page v. Fowler*, 28 Cal. 609; at any time before payment has been made for the same to the United States: 11 Opin. Atty.-genl. 491; *O'Hanlon v. Perry*, 9 Mo. 794; *Hale v. Gaines*, 22 How. U. S. 161; *Hutton v. Frisbie*, 37 Cal. 475.

29. Public Lands, Entry upon.—When a party is authorized by an act of congress generally to enter "in any land-office," etc., "a quantity of land not exceeding," etc., he is limited in his selection to lands subject to location, and cannot take lands already sold, or reserved from sale, or upon which a pre-emption or some other right has attached, under a law which is still in force, and which "covers" and protects it: *Chotard v. Pope*, 12 Wheat. 587; *Lytle v. State of Arkansas*, 9 How. U. S. 333; cited in *Hutton v. Frisbie*, 37 Cal. 475. Congress, in the passage of the act of July 1, 1864, had in view the individual interests of *bona fide* settlers upon small parcels of public lands, as well as the common interests of a community of persons so contiguously settled as to justify the establishment of a town or city, and did not intend the act for the especial benefit of municipal corporations, and to authorize under its sanction an appropriation of private property to public use, without compensation, or an arbitrary confiscation of rights of property for the benefit of municipal associations or corporations. So held in an action where the defendant, a corporation, had laid out a plaza, including a portion of the plaintiff's land, settled upon for private use: *Jones v. City of Petaluma*, 38 Cal. 406. To the same effect, held, in a case where the land was claimed by the corporation as a public street: See *Aleman v. City of Petaluma*, Id. 553.

30. Relief.—If the claimant makes out his title, he is entitled to a decree which will remove the cloud, but the court cannot order the land to be sold for payment of the debt found due by the original decree: *Wand v. Chamberlain*, 2 Black, 430. The judgment in such an action may contain a clause perpetually restraining the defendant from further setting up the claim so adjudged to be invalid: *Brooks v. Calderwood*, 34 Cal. 563. In an action brought in the usual form, to quiet title, the court will not decree a specific performance of an agreement of the defendant to convey to the plaintiff's executor: *Killey v. Wilson*, 33 Cal. 691. Where one has an outstanding deed which improperly clouds the title of the true owner, chancery will order such deed to be canceled and annulled: *Shattuck v. Carson*, 2 Cal. 588. And a

decree pronouncing that a conveyance is fraudulent and void has the result to remove any cloud resulting from its execution: *Gibbons v. Peralta*, 21 Cal. 629. So, a judgment in favor of the plaintiff, in an action to set aside a deed as a cloud upon the plaintiff's title, has a like effect, and is an adjudication that the title is in the plaintiff: *Marshall v. Shafter*, 32 Cal. 176. As to relief in N. Y., see 3 N. Y. R. S. (6th ed., 1875), p. 579 *et seq.*

31. Right of Action.—Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or the loss of his property: *Head v. Fordyce*, 17 Cal. 149. So, a party has a right to have his title to land protected from a sale which may create a cloud upon it: *Guy v. Hermance*, 5 Cal. 73. This section authorizes the interposition of equity in cases where previously bills of peace would not lie: *Curtis v. Sutter*, 15 Cal. 259. It enlarges the class of cases in which equitable relief could formerly be sought in quieting title.

32. Rights of Parties.—A party's right is limited to the object for which it was acquired, and another party may acquire another right for similar or other purposes, not in conflict with the prior right: *Hoffman v. Stone*, 7 Cal. 49; *O'Keefe v. Cunningham*, 9 Cal. 590; *Nev. Co. and Sac. Co. Canal Co. v. Kidd*, 37 Cal. 282.

33. Title.—In actions to remove a cloud upon title, the sources of plaintiff's title need not be alleged: *Lash v. Perry*, 19 Ind. 322. The facts constituting plaintiff's title and the cloud thereon should be distinctly shown: *Williams v. Ayrault*, 31 Barb. 364. Title in fee is not necessary, the allegation of a limited or equitable estate is sufficient: *Craft v. Merrill*, 14 N. Y. 456; *Lounsbury v. Purdy*, 18 N. Y. 515; see, also, 3 N. Y. R. S. (6th Ed., 1875) p. 579. In an action to quiet title to a quartz claim, a possessory title thereto is sufficient to maintain the action by a party in possession as against one out of possession: *Pralus v. Pacific G. and S. M. Co.*, 35 Cal. 30. But he must possess a title superior to that of his adversary, and of course to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name: *Boggs v. Merced Mining Co.*, 14 Cal. 279.

34. Who Bound by Judgment.—One who purchases from the defendant, during the pendency of an action to quiet title, in which action a *lis pendens* has been filed, is bound by the judgment rendered therein: *Haynes v. Calderwood*, 23 Cal. 409.

No. 472.

ii. *The Same—Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is now, and for a long time hitherto has been in the possession of that certain lot, piece, or parcel of land, situated, lying and being in the County of, State of, and bounded and described as follows, to wit: [describe property.]

II. That the said plaintiff claims title in fee to the said

premises, and that the said defendant claims an estate or interest therein adverse to the said plaintiff.

III. That the claim of the said defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof.

Wherefore the plaintiff prays:

1. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said land and premises; and that the title of plaintiff is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises, adverse to the plaintiff; and for such other relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit.

No. 473.

iii. *The Same—Another Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187., he commenced an action in the [state the court], against the said C. D. and one E. F., and afterwards, to wit: on the.....day of....., 187., by the consideration and judgment of the said [district] court, the plaintiff recovered in said action a judgment against the defendant C. D. and E. F., for the sum of.....dollars damages and costs.

II. That on the day of, 187., a writ of execution was issued on said judgment in due form of law, directed and delivered to G. H., the then sheriff of, to be executed.

III. That by virtue of such execution, the said Sheriff did levy on the lands and real estate hereinafter described as the lands and property of the said defendant C. D., and after giving and publishing the notice, and doing all things required by law, did on the day of, 187., legally sell the said lands and premises, and all the right,

title and interest which the said defendant C. D. had therein, on the day of, 187., and the above named plaintiff being the highest bidder at such sale became the legal purchaser thereof.

IV. That the said G. H., as Sheriff as aforesaid, duly executed and delivered to the plaintiff a certificate of such sale, as required by law, and after the time for redemption had expired, and neither the said C. D. nor any other person having redeemed the premises from such sale, to wit, on the day of, 187., the said G. H., as Sheriff as aforesaid, made, executed and delivered to this plaintiff a deed of conveyance of said premises as required by law.

V. That the following is a description of the said lands and premises [here describe it], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

VI. And the plaintiff further says, that at the time of the rendering of the above-named judgment, and for several years prior thereto, and at the time of said sale, the said defendant C. D. had been, and was the real owner of said lands and premises.

VII. That on the day of, 187., and after the commencement of and pending the suit of the plaintiff against said C. D. and E. F. herein above referred to, the said C. D. was largely indebted, and amongst other persons was indebted to the firm of I. K. and Company, and also to the plaintiff, on the demands for which the above judgment was rendered.

VIII. That, as the plaintiff is informed and believes, and so charges the truth to be, with a view to conceal his said property from plaintiff and other creditors, and to hinder and delay and defraud them in the collection of their debts and demands, he, the said defendant C. D. made and executed to one L. M. a conveyance of the said above described premises, so purchased by said plaintiff as above set forth.

IX. And the plaintiff is informed and believes, and therefore avers that said conveyance was without any consideration moving from said L. M. or any other person, but was wholly voluntary, sham, and fictitious; and that said L. M. held said premises under said conveyance, in secret trust

for the said C. D., until the conveyance by him as next hereinafter stated.

X. That on the day of, 187., the said L. M., at the request, as plaintiff believes and charges, of the said C. D., and without any consideration moving therefor, made and executed a conveyance of said premises to one O. D., who is the father of the said C. D.; and that, as plaintiff believes and charges, the said O. D. paid no valuable consideration, but took and held the same in secret trust for the said C. D., and with the intent to aid and abet the said C. D. in hindering, delaying and defrauding his creditors, and especially this plaintiff.

XI. And the plaintiff further avers that by virtue of the sale and purchase by him as above stated, and the conveyance from said as Sheriff, he became, and was, and is the owner of said premises; that the conveyance from said C. D. to said L. M., and from said L. M. to said O. D., were and are fraudulent and void, and operate only as a cloud on the title of said plaintiff.

Wherefore the plaintiff prays that it may be decreed:

1. That said defendant C. D. was the real owner of said premises at the time of issuing said execution and sale, and the conveyance by the said Sheriff to said plaintiff, and that said defendant O. D., at the same period, held the same in secret and fraudulent trust for said C. D. as aforesaid; and further, that the plaintiff be adjudged and decreed to be the legal owner of said premises, and that the said conveyance from said C. D. to said L. M., and from said L. M. to said O. D., may be decreed to be fraudulent and void, and of no force or effect.

2. That the said defendants C. D. and O. D. may be decreed to make, execute, and deliver to this plaintiff a deed of conveyance of all the right, title and interest in said premises; or, that some person may be appointed by this honorable court to do it for them, and that the plaintiff may have such further or other relief as the nature of the case may require; and in the meantime that the said defendant may be enjoined from selling, conveying, transferring, mortgaging, encumbering, or otherwise interfering or meddling with said premises, and for costs.

No. 474.

To Remove a Mortgage which is a Cloud upon Title.

[TITLE.] .

The plaintiff complains, and alleges:

I. That the plaintiff is the owner in fee of the following described premises, situated in [description].

II. [Allege the making of the mortgage, or other apparent lien, stating facts which show that on its face it appears valid, and that in fact it is void.]

III. That said mortgage was, on the day of , 187., duly recorded in the Office of the Recorder of said County, in Book . . . of Mortgages, p. . . . , and still remains unsatisfied of record, and a cloud upon the plaintiff's title.

Wherefore the plaintiff demands judgment:

1. That the defendant give up said mortgage to be canceled.

2. That the same be satisfied of record.

3. And for the costs of this action.

35. Mortgage on Homestead.—Where A., a married man, mortgaged the homestead to B., without concurrence of his wife, and A. and his wife subsequently mortgaged to C., and B. and C. both foreclosed their mortgages, neither making the other a party; whereupon C. filed a bill against B. to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value \$5,000: *Held*, that C. could urge the same objections to the mortgage of B., that A. and his wife could, that B.'s decree was a cloud upon the title, and impaired the security; and that C. was entitled to have it set aside: *Dorsey v. McFarland*, 7 Cal. 342.

36. Parties.—The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them: *Held*, that the latter were unnecessary parties, as the grantee in the deed from the husband, and those claiming under him, were the only parties necessary to a complete adjudication of the case: *Peralta v. Simon*, 5 Cal. 313.

37. Sheriff's Title.—The plaintiff purchased at sheriff's sale, under foreclosure of mortgage, property for twenty dollars, which was shown to be worth three thousand, with a rental of fifty dollars per month. The defendant purchased the property under another mortgage sale for two thousand dollars, and the plaintiff being in possession filed his bill to cancel defendant's deed, and remove the cloud from his title. To entitle a party to this relief, it must appear that the contract was fair, just, and reasonable, and founded upon an adequate consideration, as a court of equity will not use its powers to complete a speculation which is already too fortunate to obtain its favorable regard: *Dunlap v. Kelsey*, 5 Cal. 181.

CHAPTER V.

COMPLAINTS FOR WASTE.

*No. 475.*i. *By Lessor—Waste by Lessee.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187 , the defendant hired from him the house No., Street, San Francisco, for the term of months.

II. That the defendant occupied the same under such hiring.

III. That during the period of such occupation, the defendant greatly injured the premises [state how], to the damage of the plaintiff.....dollars, against the form of the statute.

Wherefore plaintiff demands judgment for dollars damages.

1. Allegation of Tenancy.—An allegation that the defendants held certain premises as tenants thereof to the plaintiff, under a demise to them for a certain rent, imports a tenancy for a term, and not a tenancy at will: *Parrott v. Barney*, Deady's Rep. 405.

2. Common Law Doctrine.—Although the common law doctrine of waste is not strictly applicable in this country, yet such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is waste, for which an action will lie in equity, for the prevention of such injury by injunction before it is committed, or at law, for the recovery of damages by the remainder-man, after the injury is done: *McCay v. Waite*, 51 Barb. 225. It has been held, however, that the statutes of Marlebridge and Gloucester concerning waste are a part of the common law, brought to this county from England: *Parrott v. Barney*, Deady's Rep. 405.

3. Growing Timber, when Cut.—Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste, the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it into whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property, to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value, as upon an implied contract of sale: *Halleck v. Mixer*, 16 Cal. 574.

4. Injunction.—Cutting, destroying, or removing growing timber is sufficient ground for an injunction, without any allegation of insolvency: *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544. For forms of complaints for an injunction restraining waste, see "Complaints," subdivision eighth, chapter v. For proceedings therein, see "Injunction," *post*. A purchaser of standing timber cannot obtain an injunction to stay waste committed by the cutting of the timber: First, because as to him the cutting of the timber is no waste, neither the remainder in fee-simple nor in fee-tail being vested in him; Second, because being a mere purchaser of the timber, he has adequate relief at law, if it does not appear that the defendants are irresponsible.

5. Mining Claims.—The working of a mine is waste: *United States v. Parrott*, 1 McAll. 271. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass for which injunctions are now universally granted: *Merced Min. Co. v. Fremont*, 7 Cal. 317. When the injury threatens to be continuous and irreparable: *Id.*; consult *Hill v. Taylor*, 22 Cal. 191. It is no objection to an injunction in such case that the party may possibly recover what others may deem an equivalent in money: *Hicks v. Michael*, 15 Cal. 107. Where a ditch has been excavated from the bed of a stream and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head, after the ditch is dug, so as to mingle mud and sediment with the water, and injure the ditch, or fill it up, and lessen its capacity: *Hill v. Smith*, 27 Cal. 476.

6. Parties.—The action for waste may be maintained against a guardian, tenant for life or years, joint tenant, or tenant in common of real property. It may be maintained by any person aggrieved: Cal. Code C. P., sec. 732. It has been held in Wisconsin, that under their statute, the action could only be maintained where there is a privity of estate; and that the doctrine of relation could only be applied for the protection of persons standing in some privity with the party who institutes the proceedings for the land and acquires an equitable claim or right to the title, and would not aid plaintiff in maintaining an action for waste: *Whitney v. Morrow*, 34 Wis. 644.

7. Removal of Building.—An injunction will not be granted at the suit of the landlord, against the tenant or his assigns, to restrain the commission of waste by the removal from the demised premises of a building erected by the tenant, if it appears that the landlord is not entitled to the reversion: *Per-rine v. Maraden*, 34 Cal. 14.

8. Repairs to Estate.—It is not waste in a tenant for life to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, provided it is the most economical mode: *Loomis v. Wilbur*, 5 Mason, 13.

9. Title.—Of course if the action is brought against the tenant whose possession was not derived from the plaintiff, the latter must show his title.

10. Triple Damages.—Judgment may be for triple damages: Cal. Code C. P., secs. 732-733. At common law there is no forfeiture of estate for years for the commission of waste, but it was made so by statute of 6 Edward 1, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to triple damages: *Chipman v. Emeric*, 3 Cal. 283. If the court refuse to triple the damages, the remedy is

on appeal, and not by mandamus: *Early v. Mannix*, 15 Cal. 149. When triple damages are given by statute, it must be expressly inserted, and conclude, to the damage of the plaintiff, against the statute: *Chipman v. Emeric*, 5 Cal. 239. *Held*, not to apply to justices' courts: *O'Callaghan v. Booth*, 6 Id. 66.

11. Waste Defined.—"Waste," says Mr. Justice Blackstone, "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail: Sedg. on Dam. 146; see, also, the common law with regard to waste, expounded by Lord Chief Justice Eyre, in *Jefferson v. Bishops of Dunham*, 1 Bos. & Pull. 120; and Story Eq. Jur., sec. 909.

12. Waste, what Constitutes.—It is waste to cut timber trees and sell them in exchange for firewood, but not to use for posts on the premises: *Padelford v. Padelford*, 7 Pick. 152; see, also, *Clark v. Holden*, 7 Gray, 8. In this country, no act of a tenant constitutes waste, unless it is or may be prejudicial to the inheritance, or to those who are entitled to the reversion or remainder: *Pynchon v. Stearns*, 11 Met. 304.

13. When Action Lies.—The action for waste lies, even after assignment of the reversion: *Robinson v. Wheeler*, 25 N. Y. 252. An action of waste is not maintainable against a tenant by *elegit* on the principles of the common law: 1 Co. Litt. 54; 3 Coke's R., part 6, 37; *Scott v. Lenox*, 2 Brock. Marsh. 57. The action may be maintained under the Cal. Code C. P., sec. 732, for commissive or permissive waste: *Parrott v. Barney*, Deady's Rep. 405. But a tenant at will is not liable; though if he commit voluntary waste he is liable, not as tenant but as a trespasser; and for permissive waste, as for failure to keep premises in repair, he was never liable: *Id.*

14. When Injunction will not be Dissolved.—An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute; especially where the plaintiff's bond will fully protect them for any delay, if it should turn out that they have any right: *Buckalew v. Estell*, 5 Cal. 108.

15. Wrongful.—Under an averment of wrongful waste, a recovery may be had for negligent waste: *Robinson v. Wheeler*, 25 N. Y. 252.

No. 476.

ii. *By Purchaser at Sheriff's Sale—For Waste, Intermediate the Sale and Delivery of Possession.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187..., one A. B. was the owner in fee of the following described premises: [description of premises].

II. That the said premises were at the time subject to the lien of a judgment recovered by one C. D. against E. F., in an action in the Court of the Judicial District, County, in this State, which judgment was docketed in said County [or state the county], and that

the Sheriff of said County, by virtue of an execution issued thereon, sold the same.

III. That at such sale the plaintiff became the purchaser, and the Sheriff executed and delivered to him a certificate of the said sale, and on the day of, 187..., and before this action, executed and delivered to the plaintiff a deed of the premises pursuant to the said sale thereof, and the plaintiff paid the purchase-money therefor.

IV. That intermediate the sale and delivery of the deed, the defendant being in possession [allege act of waste and damage, against form of the statute].

[*Demand of Judgment.*]

16. Sheriff's Deed.—The deed and payment should be alleged: *Farmers Bank of Saratoga v. Merchant*, 13 How. Pr. 10.

No. 477.

iii. *The Same—By Redemptioner.*

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [As in preceding form.]

III. That at such sale the defendant became the purchaser, and the Sheriff executed and delivered to him a certificate of the sale thereof.

IV. That afterwards, and before the expiration of six months, the plaintiff redeemed the same from said sale by paying the necessary amount therefor, and on the day of, 187..., and before this action, the Sheriff executed and delivered to the plaintiff a deed of the premises, pursuant to the sale and redemption.

V. [Allege acts of waste, intermediate sale and redemption, against the form of the statute].

[*Demand of Judgment.*]

No. 478.

iv. *By Remainderman—For Forfeiture and Eviction on Account of Waste.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of his death, one A. B. was seised in fee of [describe the premises].

II. That in his life-time, the said A. B. made and published his last will and testament, whereby he devised the

said land to the plaintiff, subject, however, to a devise made in the same will, of the same lands, to the defendant, for the term of

III. That on the.....day of....., 187., at....., the said A. B. died.

IV. That the defendant entered into possession of the same under the said will.

V. That on the.....day of....., 187., the defendant committed great waste on the said land [state acts of waste].

VI. That the injury thereby done to the said property, and the estate of the plaintiff therein, is more than equal to the value of the defendant's unexpired term.

Wherefore the plaintiff demands judgment:

1. That the estate of the defendant in the said property be forfeited.

2. That he be evicted therefrom.

3. For.....dollars damage.

NOTE.—This form is applicable to such states as admit by statute forfeiture and eviction on account of waste. Under the statute of California the remedy is confined to recovery of triple damages: See *ante*, note 9.

COMPLAINTS—SUBDIVISION EIGHTH.

For Specific Relief.

CHAPTER I.

CREDITORS' SUITS.

No. 479.

i. *Commencement of Complaint—One Suing for All.*

[TITLE.]

The plaintiff complains, on behalf of himself and of all others, the creditors of A. B., who shall in due time come in, and seek relief by and contribute to the expenses of this action, and alleges:

I. That the said creditors of A. B. are very numerous, to wit: more than.....in number, and that some of them are unknown to the plaintiff, and cannot with diligence be ascertained by him; and that it is impracticable to bring them all before the court in this action; wherefore he sues for the benefit of all.

Note.—The Code of Civil Procedure of California provides for proceedings supplementary to execution, which take the place of the former action for discovery. Under these proceedings the debtor may be examined, and witnesses required to appear and testify, and the judge or referee may order any property of the judgment-debtor, not exempt from execution, in the hands of the debtor or any other person, or due to the judgment-debtor, to be applied towards the satisfaction of the judgment. This order, of course only applies to those cases where it is conceded that the money or property belongs to the judgment-debtor. But if the person or corporation alleged to have property of the judgment-debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may, by an order, authorize an action to be brought by the creditor against such person or corporation for the recovery of such interest or debt, and in the mean time restrain any transfer or disposition of the debt or interest: See Code C. P., secs. 714-21. These provisions cover the whole field; and sections 4 and 8 of the same code would seem to restrict the remedy in such cases to those provided by the code. However, a complaint by a judgment-creditor who has obtained from the court or judge the proper order, against one who claims to own the property alleged to be the debtor's, or who denies an indebtedness to the judgment-debtor, must substantially conform to the old practice. For proceedings supplementary to execution under the provisions of the code above referred to, see that title in volume 3. See also

"an act for the relief of insolvent debtors, and protection of creditors," approved May 4, 1852, and an act supplementary thereto, approved March 31, 1876; Hittel's Codes and Statutes, 15,505 to 15,546.

1. Action.—"A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation:" Civil Code, sec. 3441. This principle lies at the foundation of all "creditors' suits," so called, and existed before the code.

2. Association.—Where a member of an incorporated association sues the president or other chief officers for an accounting concerning the property of the association, or for a fraudulent breach of trust in respect thereto, all the members of the association must be made parties, or the plaintiff must sue for the benefit of all others standing in the same situation as himself: *Warth v. Radde*, 18 Abb. Pr. 396; S. C., 28 How. Pr. 230; *Habicht v. Pemberton*, 4 Sandf. 657.

3. For the Benefit of All.—The language of the code, "for the benefit of all," is sufficiently stated in the above allegation: "All" "who come in and contribute to the expenses:" *Dennis v. Kennedy*, 19 Barb. 517. The code provides that "those who are united in interest shall be joined as plaintiffs; but it also, in the same section, provides that, "when the question is one of common or general interest one or more may sue for all," thus creating a distinction in the terms "united in interest," and "common interest:" Cal. Code C. P., sec. 382. Thus in the case of legatees having a common interest, one may sue in behalf of themselves and the others, and all may avail themselves of the decree: *McKenzie v. L'Amoreaux*, 11 Barb. 516; see, also, *Brooks v. Peck*, 38 Barb. 519. Otherwise, however, where the interests of several parties are united, in which case all must be joined: Cal. Code C. P., sec. 382.

4. One Suing for All.—When the question is one of a common or general interest, or it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all: Cal. Code C. P., sec. 382; N. Y. Code of 1877, sec. 448; Laws of Idaho, sec. 14; Arizona, sec. 14; Wash. Ter. sec. 15; *Smith v. Lockwood*, 1 Code R. (N. S.) 319; *Wood v. Draper*, 24 Barb. 187; S. C., 4 Abb. Pr. 322. The provisions of this section are intended to apply exclusively to suits in equity: *Andrews v. Mok. Hill Co.*, 7 Cal. 330; see vol. 1, pp. 54, 55, para. 23, 24 and 25. The rule requiring all persons materially interested to be made parties is dispensed with when it is impracticable or inconvenient, as in cases of joint associations composed of numerous individuals. In such case the statute authorizes one to sue for all: *Gorman v. Russell*, 14 Cal. 531. In such an action, when an injunction is sought, the plaintiff must allege in his complaint that he sues as well on behalf of himself as on behalf of all others equally interested with him: *Smith v. Lockwood*, 1 Code R. 319; *Wood v. Draper*, 24 Barb. 187; 4 Abb. Pr. 322. Or for the benefit of those interested who may "come in and contribute to the expenses," or, "for the benefit of the whole:" *Id.*; *Dennis v. Kennedy*, 19 Barb. 517.

5. Parties.—In New York, no creditor can individually maintain an action against an individual stockholder for the share illegally distributed to him. The liability is to the creditors generally, and the action should be commenced by some party representing all the creditors: *Osgood v. Laytin*, 5 Abb. Pr. (N. S.) 1.

*No. 480.*ii. *The Same—Where a Particular Class of Creditors only are Concerned.*

[TITLE.]

The plaintiff complains, on behalf of himself and all others, the creditors of A. B., who are parties to the deed of trust hereinafter mentioned [or whose executions have been returned unsatisfied], and who shall come in and seek relief by and contribute to the expenses of this action, and alleges:

I. [The same as in preceding form, omitting “wherefore he sues for the benefit of all.”]

II. That the question which is the subject of this action is one of a common and general interest of all the said creditors under the said trust deed; wherefore the plaintiff sues for the benefit of all.

III. [Allege cause of action.]

[Demand of Judgment.]

6. Parties to the Deed of Trust.—It is only the particular class who might have brought the suit who can come in: *Parmalee v. Egan*, 7 Paige, 610; *Cooke v. Smith*, 3 Sandf. Ch. 333. Where a lien creditor seeks relief in equity, in behalf of himself and other creditors of the same class, the decree should provide for the relief of all: *Trustees of Wabash and Erie Canal v. Beers*, 2 Black, U. S. 448. All parties in the same manner affected, though in different degrees, may be joined: *Vermeule v. Beck*, 15 How. Pr. 333; *Van Rensselaer v. Layman*, 10 How. Pr. 505; *Wandell v. Turney*, 5 Duer, 661.

*No. 481.*iii. *Creditor's Action on a Judgment of a Court of Record, to Set Aside Fraudulent Assignment.*

[TITLE.]

The plaintiff complains, and alleges [or commencement as in preceding form]:

I. That on the....day of....., 187..., at....., judgment was rendered in the.... Court in his favor, against the defendants C. D. and E. F., for.....dollars.

II. That on the....day of....., 187..., an execution was issued upon the said judgment, against the property of the said C. D. and E. F., addressed to the Sheriff of the County of....., in which they then resided.

III. That the said execution has been returned by the said Sheriff, wholly unsatisfied.

IV. That after the contracting of the debt on which the

aforesaid judgment was recovered, the said C. D. and E. F. assigned all their property to one G. H., in trust for the payment of their debts [or made an assignment, of which a copy is hereto annexed].

V. That the said G. H. accepted the said trust, and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over
..... dollars.

VI. That the said assignment was made with intent to delay and defraud the creditors of the said C. D. and E. F.; that ever since the said assignment was executed and delivered, the said property has remained, and still remains in the possession and under the control of the said C. D. and E. F., who falsely pretend that they are agents of said assignee.

VII. That the pretended indebtedness named and set forth in said assignment as due from said C. D. and E. F. to the defendant G. H., is fictitious; that said C. D. and E. F. were not indebted to said G. H. in the sum therein named, or in any sum whatever, but the same was therein inserted for the purpose of consuming the proceeds of said goods, or of some part thereof, to the injury of plaintiff.

VIII. That the defendants C. D. and E. F. have not, nor have either of them any property other than that assigned as aforesaid, out of which plaintiff's said execution could be satisfied in whole or in part, and that unless said property can be applied to the payment of said judgment the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That the said assignment is fraudulent and void as against the plaintiff.

2. That the said G. H. account, under the direction of the Court, for all the property received by him as aforesaid.

3. That the defendants be restrained by injunction from interfering with the said property or its proceeds, except under the direction of the Court.

4. That the plaintiff's judgment be satisfied out of the same.

7. Acceptance of Trust.—This averment is not absolutely essential, as the action can be maintained, and the burden of accepting or disclaiming the trust be thrown upon the assignee: *Gasper v. Bennett*, 12 How. Pr. 307. A

complaint joining with the assignee the administrator of a deceased assignor, should allege that the administrator claimed that the transfer was valid: *Bate v. Graham*, 11 N. Y. 237.

8. Allegation where Debtor in the Judgment is not Defendant because of Insolvency and Absence.—That said [judgment-debtor] is wholly insolvent and destitute of property [or is not, and has not been for the space of, within this state, but resides at San Salvador, in the state of Honduras, and has no property within this state]. This is a necessary and sufficient excuse for the non-joinder: *Van Cleef v. Sickles*, 5 Paige, 505.

9. Allegation where Debtor in the Judgment is not Defendant because merely a Surety.—That the said judgment was recovered in an action [describe it], brought to foreclose a mortgage made by the defendant to said [surety], with a note collateral thereto, and that said note and mortgage was assigned to the plaintiff by the said [surety], who thereupon guaranteed the payment thereof; but the same not being paid, and the mortgaged premises being sold upon foreclosure in said action for less than the sum due, said judgment was recovered for the deficiency, as to which the said [surety] was merely a surety, and not liable as a principal debtor, and which it was, by a provision in said judgment, directed should be levied of the property of the defendant (principal debtor), if it could be so collected; and if it could not, then to be levied of the property of said [surety].

10. Allegations Essential.—The complaint must contain an allegation of the issue of an execution: *McCullough v. Colby*, 5 Bosw. 477. That an execution was duly issued was held sufficient: *French v. Willett*, 10 Abb. Pr. 102.

11. Allegation of Bad Faith.—In a complaint in a creditor's action, seeking to set aside a conveyance as fraudulent, an allegation that the grantee, the debtor's wife, gave no consideration for the premises conveyed to her, and that the whole consideration came from her husband, is a sufficient allegation of bad faith or fraudulent intent on her part: *Newman v. Cordell*, 43 Barb. 448.

12. Attachment-Creditor.—It has been frequently held that the lien acquired by the levy of an attachment will not alone authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment action: 24 Barb. 105; 11 Abb. Pr. 220; 30 Barb. 552; 13 N. Y. 488; *Mechanics' and Traders' Bank v. Dakin*, 28 How. Pr. 502. But the plaintiff obtains such a lien upon the property attached as will entitle him to the intervention of equity to remove or set aside fraudulent obstacles to the enforcement of the lien, and for this purpose may maintain an action to reach the fund fraudulently transferred by the debtor: 28 N. Y. 45; *Greenleaf v. Mumford*, 19 Abb. Pr. 469; 30 How. Pr. 30.

13. Averment of Liability.—A general averment that the defendant was primarily liable is not enough to excuse the plaintiff from issuing execution against other defendants or making them parties: *Strange v. Longley*, 3 Barb. Ch. 650; see *Speiglemeyer v. Crawford*, 6 Paige, 254.

14. Creditor's Suit Defined.—A creditor's suit is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law: *Hatch v. Dorr*, 4 McLean, 112.

15. Delay, Hinder, and Defraud.—A mere general allegation that it was made to delay, hinder, and defraud, is not sufficiently specific where the

fraud is extrinsic to the instrument: *Kohner v. Ashenauer*, 17 Cal. 580; *Kinder v. Macy*, 7 Id. 206; *Meeker v. Harris*, 19 Id. 278; *Harris v. Taylor*, 15 Id. 348; *Castle v. Bader*, 23 Id. 77; *Kent v. Snyder*, 30 Id. 674; *Morenhout v. Brown*, Cal. Sup. Ct., July term, 1863, not reported; but see *Mott v. Dunn*, 10 How. Pr. 225.

16. Duly Given.—These words are not necessary in case of a judgment rendered by a court of co-ordinate jurisdiction: *Williams v. Hogeboom*, 8 Paige, 469.

17. Docketing.—If the judgment is one which will run into any county, docketing in another county need not be averred unless real property of the defendant be there situated: *Millard v. Shaw*, 4 How. Pr. 137. The docketing of a judgment has the effect of imparting constructive notice, even to strangers to the judgment, of the lien of the judgment on the real estate of the judgment-debtor: *Page v. Rogers*, 31 Cal. 293.

18. Enforcing Trust against Attorney.—A court of equity will enforce the trust which the law raises, where an attorney has in his hands, with notice of the right of the judgment-creditors, the property of his clients: *Cowing v. Greene*, 45 Barb. 585.

19. Fictitious Grantee.—In a bill to set aside certain conveyances of real estate as fraudulent against creditors, there is no necessary inconsistency in averring the grantee to be a fictitious person, and that the deed to him, or in his name, was made to hinder and defraud creditors: *Purkitt v. Polack*, 17 Cal. 327.

20. Form of Bill.—It is immaterial whether the bill in form be a creditor's bill, if it contains upon its face matters for relief: *Sedam v. Williams*, 4 McLean, 51. It should be so definite in description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation: *Miller v. Sherry*, 2 Wall. U. S. 237.

21. Fraud, how Alleged.—Whether a complaint seeking to set aside a conveyance on an allegation that it was made voluntarily and without a valuable consideration, and to hinder, delay and defraud creditors, and particularly plaintiff, is demurrable because of the generality of this allegation of fraud, and what degree of particularity in the statement of facts and circumstances is required when a fraudulent conveyance is alleged to have been made: See *Kohner v. Ashenauer*, 17 Cal. 578. The Civil Code declares the question of fraudulent intent to be one of fact, and not of law, and that a transfer or change cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration: Sec. 3442.

22. Fraudulent Conveyance.—If a debtor, anticipating a judgment against him, fraudulently conveys his property to another who is privy to the fraud, with intent to hinder and delay the creditor, who thereafter obtains judgment, and levies his execution on the property in the hands of the fraudulent grantee, but is afterwards induced to release the levy on the false and fraudulent representations of the grantor, and to permit his judgment to become barred by the statute of limitations, by reason of similar false representations by the judgment-debtor, to the effect that he has no property, and is insolvent, the creditor, on averring and proving the facts, and that he discovered the fraud but recently before the commencement of the action, is entitled to relief: *Marshall v. Buchanan*, 35 Cal. 264.

23. Fraudulent Judgments.—Where several fraudulent judgments are confessed in several courts, it would not be necessary for a creditor to bring a different suit in each different court: *Uhlfelder v. Levy*, 9 Cal. 607. Such judgments are void against creditors: Civ. Code, sec. 3439.

24. Husband and Wife.—Property bought by the husband as the agent of his wife, with her money, and afterwards, in good faith, and without intent to defraud creditors, sold by him as her agent at a profit, is not subject to the claims of the creditors of the husband to the extent of the profit, on the ground that the profit was the result of his skill or ability: *Merchant v. Bunnell*, 3 Keyes, 539. Profits derived from an investment of the money of the wife in her name, are to be regarded as belonging to her, although they were secured by the agency of her husband in the management of the business: *Id.*

25. Inceptive Steps.—In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance is not irrelevant or redundant matter: *Perkins v. Center*, 35 Cal. 713.

26. Injunction.—As to when an injunction will be granted to attaching creditors of an insolvent, see *Heyneman v. Dannenberg*, 6 Cal. 376; consult, also, "Injunction," *post*, as to proceedings thereon.

27. Insolvency of Debtor.—A complaint, by a judgment creditor who has obtained a sheriff's deed, to cancel a deed given by the debtor to defraud the creditor before judgment was recovered, need not aver that the debtor was insolvent when he made the deed: *Hager v. Shindler*, 29 Cal. 47. It need not be averred that the plaintiff has exhausted his remedy at law by issuing an execution and having it returned *nulla bona*, for the reason that the fraudulent deed is a cloud on the title: *Id.* In an action by a creditor to defeat a conveyance on the ground of fraud, where there is no allegation of insolvency, and the charges of fraud are in the most general form, the conveyance, however fraudulent as to creditors, being valid as between the parties, no one can impeach it without showing that he has been injured thereby, and that he is deprived of his remedy at law, and that the debtor has no other property which may be reached by ordinary legal remedies; that such remedies have been exhausted, or that resort to them would be fruitless. The specific facts constituting the fraud must be averred: *Harris v. Taylor*, 15 Cal. 348. An allegation that after the transfer the company became insolvent, and was dissolved, is an indirect statement that it was solvent when the transfer was made. It would be untrue to say that the company became insolvent after the assignment, if it were insolvent before and at the time of the assignment: *Nelson v. Eaton*, 15 How. Pr. 305.

28. Joinder of Causes.—A claim to set aside two several conveyances, fraudulently made by a judgment-debtor to several grantees, may be brought in one action: *Jacot v. Boyle*, 18 How. Pr. 106.

29. Joint Associations.—It is not necessary to make all persons materially interested parties to the suit. When it is impracticable or inconvenient, one may sue for all: *Gorman v. Russell*, 14 Cal. 531; *Von Schmidt v. Huntington*, 1 Id. 55; *Kirk v. Young*, 2 Abb. Pr. 453. The remedy against the joint property of an association or partnership must be exhausted before action can be brought against the individual members: *Robbins v. Wells*, 26 How. Pr. 15.

30. Legal Remedy must be Exhausted.—The remedy at law must be exhausted before a court of equity will grant relief, and the creditor must have acquired an equitable lien: *Dunlevy v. Tallmadge*, 32 N. Y. 457. In a proper case, a creditor's bill can be maintained, where the action is commenced after a return in good faith of *nulla bona*, though it be made within the sixty days allowed by law as the possible life of an execution: *Renaud v. O'Brien*, 35 N. Y. 99. But a judgment-creditor may resort to chancery to subject the effects of his debtor, beyond the reach of execution at law, before he takes out execution on his judgment, if it appear that the debtor has not effects liable to execution to satisfy the judgment, or the effects are connected with equities or trusts, or involve a variety of interests, so that adequate remedy cannot be had at law: *Piatt v. St. Clair's Heirs*, 6 Ohio, 227. As to necessity of averring that execution was issued, and a return of no property, see *Bomberger v. Turner*, 13 Ohio St. 263.

31. Lien.—Where a judgment-creditor obtains judgment against his debtors and the assignee, declaring the assignment void and appointing a receiver, he has an equitable lien upon the assets which dates from the commencement of the action: *Field v. Sands*, 8 Bosw. 685. It seems that the lien acquired by the commencement of a creditor's suit, to reach equitable interests and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained: *Stewart v. Isidor*, 5 Abb. Pr. (N. S.) 68. If it be otherwise, a creditor claiming such a lien, under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien: *Stewart v. Isidor*, 5 Abb. Pr. (N. S.) 68. The filing of a creditor's bill gives, according to the law of New York, a lien, which will not be divested by subsequent proceedings in bankruptcy: *Sedgwick v. Menck*, 6 Blatch. 156; *Carr v. Fearington*, 63 N. C. 560; see also *Stewart v. Isidor*, *supra*; *contra*, *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325. If the process issued on filing the bill be served before defendant's petition in bankruptcy be filed, it is a lien under the bankrupt law: *Clark v. Rist*, 3 McLean, 494. Insolvency of a general and ordinary partnership gives the partnership-creditors no lien, nor is the property converted into a trust fund for their benefit: *Dunlevy v. Tallmadge*, 32 N. Y. 457. A judgment-creditor, having no title or specific lien, may maintain an action to obtain the cancellation of prior judgments which are apparent liens upon the lands of the debtor, but which he alleges to have been paid, and this without alleging collusion to keep judgments on foot to defraud creditors: *Shaw v. Dwight*, 27 N. Y. 244.

32. Mortgage.—Where in a creditor's bill, filed to compel the application of choses in action, equitable interest, etc., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance of land to B., who is also a party, and it is claimed that the deed should be set aside, and it appears that the conveyance was made in good faith, but that B. gave to A. a mortgage thereon which is unpaid, it is competent for the court to decree that B. pay such mortgage to the receiver, to be applied on the judgment, although such mortgage was not named in the bill or in the prayer for relief: *Durand v. Hankerson*, 39 N. Y. 287. The objection that a third person should have been made a party as assignee, and that B. may hereafter be called upon to pay the mortgage to him, is waived by B., if he does not make

it by answer or demurrer: *Durand v. Hankerson*, 39 N. Y. 287. In such case, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and the evidence tended to show an assignment by A. to him, still it being proven and found that such assignment was fraudulent, it was proper to require B. to pay the mortgage to the receiver: *Durand v. Hankerson*, 39 N. Y. 287.

33. Mortgagors.—In a creditor's bill to subject the interest of a mortgagor in land, it is not necessary to tender the money due to the mortgagee. In such proceeding the mortgagor's interest may be sold: *Matlocks v. Humphrey's Adm'r*, 17 Ohio, 336.

34. Non-Resident Debtor.—It is sufficient for the plaintiff to show that all remedies at law were exhausted against the debtor in the State in which he resided, and that in this State no legal remedy was available: *McCartney v. Bostwick*, 32 N. Y. 53.

35. Obstructions to Execution.—Such an action lies to set aside fraudulent obstructions which lie in the way of a satisfaction of the judgment. Or where the execution will not avail to cancel the judgment, he may bring an action in aid of his execution to reach property upon which a levy cannot be made: See *Hadden v. Spader*, 20 Johns. 554; upon personal or real property: *Congden v. Lee*, 3 Edw. 304.

36. Order of Distribution.—For the order in which funds recovered by a creditor's bill will be distributed in a case involving the relative priority of holders of judgments recovered before and after the commencement of the suit, and creditors at large: See *Wallace v. Treake*, 27 Gratt. (Va.) 479.

37. Parties.—A creditor's bill may charge both the debtor and his surety, or an administratrix of the latter, to have combined with the debtor in committing a fraud: *McLaughlin v. Bank of Potomac*, 7 How. U. S. 220. Or it may be filed against the supervisors of a county: *Lyell v. St. Clair Co.*, 3 McLean, 580. In a bill to set aside a conveyance as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill: *Gaylords v. Kelshaw*, 1 Wall. U. S. 81.

38. Partnership Debtor.—A creditor of a partnership cannot have an assignment for the benefit of creditors set aside, merely because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. The one hindered, delayed or defrauded, can alone bring the action: *Morrison v. Atwell*, 9 Bosw. 503. The judgment-creditor of a limited partnership is entitled to bring an action to set aside any void assignment which hinders the enforcement of the judgment and execution against the joint and separate property of any of the members of the partnership: *Fanshaw v. Lane*, 16 Abb. Pr. 71. It seems that creditors of a firm cannot reach the property of a deceased partner in the hands of his surviving partner, without having someone before the court entitled to represent the estate of the deceased: *Loeschigk v. Hatfield*, 5 Rob. 26. A judgment-creditor need not have possession of land, to enable him to maintain a suit in equity after he has a sheriff's deed, to cancel a deed of the same given by the debtor to defraud him before he recovered judgment: *Hager v. Shindler*, 29 Cal. 47.

39. Practice in California.—The proceedings supplementary to execution are special proceedings regulated by statute, and when the execution is

returned unsatisfied, the judgment-debtor may be made to appear within the county where he resides: Cal. Code C. P., sec. 714. They are a substitute for a creditor's bill in the old practice: *Adams v. Hackett*, 7 Cal. 187; *Byrd v. Badger*, 1 McAll. 443. The obvious purpose is to give the creditor an immediate and summary remedy against the debtor's property; but not to permit the rights of third parties to be brought into litigation, except in a regular way, by suit: *Goodyear v. Betts*, 7 How. Pr. R. 187; *The People v. King*, 9 Id. 97, 100; *Gasper v. Bennet*, 12 Id. 307.

40. Practice—Examination of Debtor.—When the plaintiff proceeded, under section two hundred and thirty-nine of the Practice Act, (Cal. Code C. P., sec. 715) to examine his judgment-debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding: *Adams v. Hackett*, 7 Cal. 187.

41. Practice—Refusal to Obey Order.—A commitment for contempt, for refusing to obey an order of the court, commanding the imprisonment of the party in contempt, until he shall comply with the order, should set forth that it is in the power of the party to comply: *Ex parte Cohen*, 6 Cal. 318.

42. Practice—Payment to Sheriff.—After the issuing of an execution against property, and before its return, any person indebted to the judgment-debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution: Cal. Code C. P., sec. 716. In order to bring a party within the terms of this section, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs: *Brown v. Ayres*, 33 Cal. 525. Where the plaintiff, in an action for personal tort, after a verdict in his favor, and before judgment, assigned the cause of action and verdict, the assignment was void, and the payment by defendant to the sheriff was a satisfaction of the judgment: *Lawrence v. Martin*, 22 Cal. 173.

43. Practice—Order to Appear.—The judge may order debtors of the judgment-debtor to appear and be examined as to the property of the judgment-debtor in their hands: Cal. Code C. P., sec. 717. And may order the property applied on execution: Cal. Code C. P., sec. 719; see *Hathaway v. Brady*, 26 Cal. 586.

44. Priority.—The complainants who first filed the bill have no preference thereby over the other creditors; all may have a *pro rata* distribution: *Day v. Washburn*, 24 How. U. S. 352. So, with one of numerous bondholders of a corporation, who are secured by a mortgage to trustees, the other bondholders are entitled to come in for their proportion of the mortgaged premises: *Martin v. Somerville Water Power Co.*, 27 How. Pr. 161; *Pennock v. Coe*, 23 How. U. S. 117.

45. Property in Possession.—To sustain an order that he apply property in his possession to the judgment, it is not enough that he has it in his possession. It must appear to be his property. If the contrary appears, the remedy to test the title is for the receiver to bring action for the property: *Rodman v. Henry*, 17 N. Y. 482.

46. Relief.—The relief to be granted will be only what on the whole appears due to plaintiff: *Bean v. Smith*, 2 Mas. 252; see *Burton v. Smith*, 13

Pet. 464. For the relief granted in some cases turning upon the special circumstances shown, see *Hagan v. Walker*, 14 How. U. S. 29; *Green v. Creighton*, 23 Id. 90; *Ogilvie v. Knox Ins. Co.*, 2 Black, 539; *Adler v. Fenton*, 24 How. U. S. 352.

47. Relation of Surety.—It was held enough, after stating facts to show the relation of suretyship, to aver that the creditor's suit was prosecuted for the benefit of the surety: *Child v. Brace*, 4 Paige, 309. If a surety has a counter-bond or security from the principal debtor, the creditor will be entitled to the benefit of it, and may in equity subject such security to the satisfaction of the debt, so far as it can be done without trenching upon the rights of the surety himself: *Van Orden Admr. v. Durham*, 35 Cal. 136.

48. Return of Execution.—It is immaterial that the return is made at the request of the plaintiff: *Forbes v. Waller*, 25 N. Y. 430.

49. Rights of Creditors.—A creditor who has exhausted his remedies at law can attack the validity of an assignment on the ground of fraud, and reach by a judgment avoiding the assignment any property remaining in the hands of his assignees, or which is subject to their control: *Lawrence v. Bank of the Republic*, 3 Robertson, 142; and see 35 N. Y. 320-322.

50. Sale of Property.—Every sale of property and personal chattels is good between the parties, and cannot be attacked, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied, in whole or in part—with the single statutory exception of an attaching creditor; and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued under the statute, before he can attack the sale: *Thornburgh v. Hand*, 7 Cal. 554. For such a purpose the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ: *Id.*

51. Trustee, who is.—When a party has in his possession or under his control any money or other thing capable of delivery, which being the subject of the litigation, is held by him as trustee for another party, the court may order the same to be deposited in the court or delivered to such party, on such conditions as may be just: Cal. Code C. P., sec. 572.

52. Voluntary Conveyance.—A voluntary conveyance of his property to his wife, by one about to engage in a business which he believes may subject him to losses, in order to secure such property for himself and family in the event of such losses, is fraudulent: *Case v. Phelps*, 39 N. Y. 164: *Held*, that a voluntary conveyance made in performance of previous equitable duty to convey, in pursuance of an oral agreement fully performed by the grantee, could not be impeached by an immediate creditor subsequently recovering judgment: *Dyggert v. Remerschnider*, 32 N. Y. 629. A conveyance without consideration, made to defraud the creditors of the grantors, and recorded, is valid against a subsequent purchaser for a valuable consideration: *Stephens v. Morse*, 47 N. H. 532.

53. When Action Lies.—Upon the question how far a creditor must have proceeded by judgment and execution in various cases before he can maintain a creditor's suit in equity, see *Hagan v. Walker*, 14 How. U. S. 29; *Green v. Creighton*, 23 Id. 90; *Adler v. Fenton*, 24 Id. 407; *Jones v. Green*, 1

Wall. U. S. 330; *United States v. Sturges*, 1 Paine, 525; *McCalmont v. Lawrence*, 1 Blatchf. 332; 5 N. Y. Leg. Obs. 205; *Howe v. Cobb*, 3 McLean, 270. This remedy may still be pursued: *Hammond v. Hudson River Iron and Machine Co.*, 20 Barb. 378; *Catlin v. Doughty*, 12 How. Pr. 457. The right to this action is confined, however, to the judgment creditor: *Reubens v. Joel*, 3 Kern. 488; for his own benefit, or he may unite with other creditors standing in the same relation with himself, and whose judgments have been returned unsatisfied: *Wakeman v. Grover*, 4 Paige, 23; *Lentilhon v. Moffatt*, 1 Edw. 451. Mere creditors at large cannot file a bill to reach the assets of their debtors: 3 Kern. 488. A creditor whose debtor is imprisoned in the state prison for a term less than his natural life, may sue and subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment: *Estate of Nerac*, 35 Cal. 392.

54. What may be Reached.—In Tennessee, a creditor who has sold his debtor's land by execution, and became the purchaser, may, by bill, under the code, section 4282 *et seq.*, subject to the satisfaction of the residue of his judgment the equitable interest of the debtor in the land by virtue of his right to redeem: *Weackley v. Cockrill*, 2 Tenn. Ch. 316. The question was reserved whether the lien of the plaintiff acquired by filing his bill, affects the right of other judgment creditors to redeem: *Id.*

55. Who may Assign.—One partner of a firm, expressly or by implication sole manager, his partners being absent, may assign firm property in trust for benefit of creditors: *Forbes v. Scannell*, 13 Cal. 242. A gift by a husband to a wife, made when he is free from debt, cannot be impeached on the ground of debts subsequently contracted: *Phillips v. Wooster*, 3 Abb. Pr. (N. S.) 475. In a complaint in a creditor's action seeking to set aside a conveyance as fraudulent, an allegation that a grantee, a debtor's wife, gave no consideration for the premises conveyed to her, and that the whole consideration came from her husband, is a sufficient allegation of bad faith or fraudulent intent on her part: *Newman v. Cordell*, 43 Barb. 448.

56. Who may Sue.—A creditor having obtained judgment against a debtor may bring suit in aid of execution: *Hendricks v. Robinson*, 2 Johns. Ch. 283. A creditor cannot avoid an assignment merely on the ground that it contains a provision which is illegal, if such provision tends to his benefit; he must show himself injured thereby: *Fox v. Heath*, 16 Abb. Pr. 163. Mere creditors at large cannot file a bill to reach the assets of their debtor, and no distinction exists between simple contract creditors of an individual, and those of a corporation: *Miller v. Earl*, 24 N. Y. 110; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Coope v. Bowles*, 42 Barb. 87; *Field v. Chapman*, 24 How. Pr. 463; 15 Abb. Pr. 434. And even a general creditor's bill is not maintainable by a creditor at large: *Dunlevy v. Tallmadge*, 32 N. Y. 457; reversing *Fassett v. Tallmadge*, 18 Abb. Pr. 48. A sheriff cannot institute a creditor's suit to reach the proceeds of the assigned property, that they may be applied on an execution in his hands: *Lawrence v. Bank of the Republic*, 35 N. Y. 320; reversing S. C., 3 Robertson, 142. Creditors of an indebted corporation are entitled to the aid of a court of equity against such corporation and its debtors: *Ogilvie v. Knox Ins. Co.*, 2 Black, U. S. 539.

No. 482.

vi. *Upon a Justice's Judgment.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, before J. P., a Justice of the Peace in and for the town of, county of, in this State, the plaintiff recovered a judgment, which was duly given by said Justice, against the defendant, for dollars damages and dollars costs in an action wherein this plaintiff was plaintiff, and the defendant herein was defendant.

II. That on the day of, 187., a transcript of the same was filed and docketed in the office of the Clerk of the County of, in this State [in which County the defendant then resided].

III. That on the day of, 187., an execution was duly issued upon the said judgment, against the property of the defendant, and addressed to the Sheriff of said County.

[Continue as in last form.]

57. Allegation where Debtor's Residence is Unknown.—That on the day of, 187., an execution was issued upon the said judgment, against the personal and real property of the defendant, to the sheriff of said county, in which county was the defendant's last known residence within this State, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor.

58. Docketing.—The docketing of justices' judgments must be averred, and an execution against real as well as personal property issued and returned unsatisfied: *Crippen v. Hudson*, 13 N.Y. 161. The filing of a transcript of a judgment-docket of a district court with the recorder of any other county makes it a lien upon the real estate in that county, but it does not make it a judgment of the district court for that county: *People v. Doe*, 31 Cal. 220. It is the duty of the county clerk, as such, and not the clerk of the district court, as such, to issue execution. District courts have no power to issue writs of assistance in cases of sales upon judgments rendered by justices of the peace or other district courts: *People v. Doe*, 31 Cal. 220. It becomes a lien upon the debtor's real property in that county for two years from the date of the filing, notwithstanding a lien by virtue of the same judgment has previously existed and expired by lapse of time in another county: *Donner v. Palmer*, 23 Cal. 40; see Cal. Code, C. P., secs. 897 to 900.

ESTEE, VOL. II—14.

No. 483.

v. Against Debtor, to Reach Demands due him from Third Parties.

[TITLE.]

The plaintiff complains, and alleges :

I. [Allege rendition of judgment.]

II. That on the day of, 187., said judgment was docketed in the office of the Clerk of said County, and on the day of, 187., a transcript thereof was filed, and the said judgment was docketed in the Clerk's office of the County of in this State.

III. That on the day of, 187., an execution was issued upon the said judgment against the personal and real property of the defendant, to the Sheriff of said County, in which county the defendant then resided.

IV. That the said execution was returned by said Sheriff wholly unsatisfied.

V. That before the commencement of the action, and after the indebtedness had accrued upon which said judgment was obtained, the defendant was, and for several years previous thereto had been engaged in mercantile business at, California, and as the plaintiff is informed and believes, various persons became indebted to him to a large amount, and that the defendant had, at the time of the commencement of this action, moneys due him to a large amount, to wit: to an amount not less, as plaintiff is informed and believes, than dollars, a considerable portion of which are evidenced by charges on his books of account, which the said defendant refuses to produce, or allow to be examined by or on behalf of the plaintiff; and the plaintiff is therefore unable to specify, and cannot learn, and does not know, the particular items or amount of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of them, owing defendant in the aggregate a sum not less than dollars, reside at, and are solvent and able to pay the respective demands against them.

Wherefore the plaintiff demands:

1. That the said defendant be adjudged to apply to the payment of said judgment and interest thereon, together with the costs of this action, said property, debts, choses

in action, and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested.

2. That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests.

3. That he be prohibited from making an assignment, or confessing any judgment, to enable other creditors or persons to obtain a preference over plaintiff, or to take any portion of defendant's property.

4. That a receiver be appointed of all said property, equitable interests, things in action, and effects of the said defendant, and that said defendant be directed to execute to him an assignment thereof, and that said receiver sell or otherwise dispose of the same, and convert the same into money, as soon as may be, and apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the plaintiff's said debts, with interest and costs of this action.

No. 484.

vi. *Against Debtor and his Trustee—To Reach the Trust Fund or Income.*
[TITLE.]

The plaintiff complains, and alleges:

I. [Allege judgment, execution, and return.]

II. That the defendant [A. B.] is the beneficiary under a trust created by deed heretofore executed by him, of which a copy is hereto annexed, marked "Exhibit A."

III. That the fund, consisting of about dollars, is now in the hands of the defendant [C. D.] as trustee, and the defendant [A. B.] is entitled to receive, and does receive, annually, the sum of dollars therefrom.

Wherefore the plaintiff demands judgment:

1. That the defendants be enjoined respectively from paying over and from receiving said fund, and that the same be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action.

Form.—See *Scott v. Nevius*, 6 Duer, 672; *Sillick v. Mason*, 2 Barb. Ch. 79; *Havens v. Healy*, 15 Barb. 296; *Cruger v. Jones*, 18 Id. 467; *Bramhall v. Ferris*, 14 N. Y. 41.

59. Action to Enforce Trust.—An action by a creditor to enforce the trust which is raised by the statute, in favor of the creditor of a person pay-

ing the consideration of a purchase of land conveyed to a third person, is not an arbitrary creditor's suit, within the rule that the legal remedy must first be exhausted: *McCartney v. Bostwick*, 32 N. Y. 53.

60. Enforcement of Trust.—A court of equity will enforce a trust against all persons, who with notice of the trust came into the possession of the trust property, in the same manner and with the like effect as against the original trustee: *Lathrop v. Bampton*, 31 Cal. 17.

61. Partner as Trustee.—If two partners are embarrassed with debts, and one executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual and partnership property, for the purpose of raising money, by mortgaging the same, to pay the debts of the firm, there is no express trust, nor does a trust arise by implication of law: *Burt v. Wilson*, 28 Cal. 632.

62. Property Held in Trust.—Property held in trust for a debtor, and for his benefit, or arising out of a fund proceeding from a third person in trust, to secure to the debtor personally a support, cannot be reached or taken by a judgment-creditor, by means of proceedings supplementary to execution: *Locke v. Mabbett*, 2 Keyes, 457. The provisions of section 297 of the New York code were never intended to be applicable except to a case where it is clearly established or is admitted that the party upon whom the order is to be made has in his hands property of the judgment-debtor or is indebted to him. If these facts are not established, the proper course is to appoint a receiver, with leave to sue in equity, to ascertain if there be any surplus by an accounting: *Id.* A trustee cannot, by mingling moneys with other funds, change his character from that of trustee to that of mere debtor: *Gunter v. Janes*, 9 Cal. 643.

63. Stale Trust.—Courts of equity, acting on their own inherent doctrines of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*: *Badger v. Badger*, 2 Wall. U. S. 87. A valid declaration of trust as to lands held for the use of another may be made at any time, and does not necessarily have to be made at the time of the creation of the trust: *Sime v. Howard*, 4 Nev. Rep. 473.

No. 485.

vii. *Against Debtor, Seeking to Set Aside, as Fraudulent, Transfer of his Assets to a Third Person for Note, the Note Assigned for Benefit of Creditors.*

[TITLE.]

The plaintiff complains, and alleges:

I. II. and III. [Allege judgment and issue and return of execution, as in previous forms.]

IV. That on the day of, 187., said A. B. was a merchant, doing business at, and was possessed of [designate assets].

V. That on that day, and after the indebtedness for which the plaintiff's judgment was recovered had accrued, the said

defendant A. B., in contemplation of and with full knowledge of his insolvency, made a pretended sale of his said stock to the defendant C. D., then a clerk in his employ, and took in payment therefor his promissory note having several months to run, but for what exact amount the plaintiff does not know and cannot state.

VI. That the defendant C. D. was and is wholly irresponsible and insolvent, and has no means of paying his said note, except such moneys as he may derive from the sale of the property transferred to him as aforesaid.

VII. That thereafter and on the said day the said A. B. executed and delivered to the defendant E. F. an instrument in writing, of which the following is a copy: [Copy assignment].

VIII. That the property so assigned is of the value of about dollars.

IX. That the said note of the said C. D., and the said assignment to E. F., were intended by each and all of the aforesaid defendants to be one transaction, and were in fact one transaction, and were intended for the purpose of delaying, hindering, and defrauding the creditors of said A. B., by putting it out of the power of such creditors to reach the stock and assets of the said A. B.; that such sale and assignment were not, nor was either of them, followed by immediate and continued change of possession; that ever since the said sale and assignment and up to the present time, the said property has remained in the actual possession and under the control of the said A. B., who has retained possession and control thereof under the pretense that he is agent of said C. D.

X. That the defendant A. B. has not any property other than that embraced in the sale and assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part, and that unless the said property can be applied to the payment of said judgment, the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That the said sale by the defendant A. B. to the said C. D., and said assignment by the defendant A. B. to the defendant E. F., may each be declared fraudulent and void as against this plaintiff.

2. That a receiver of all the property and effects of the said A. B., which he had at the time of the said sale to the defendant C. D., or at any time thereafter, be appointed.

3. That the defendants, C. D. and E. F., be adjudged to account for all the property received by them, under either the sale or assignment aforesaid, and for all proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That the defendants be in the meantime enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith.

5. That the said receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay out of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the order of this Court.

64. Allegation where Value of Assets is not Sufficient to Satisfy the Debt.—That assets to the value of.....dollars have been delivered by the executor to the next of kin of the deceased, but the value of said assets so delivered is not sufficient to satisfy the plaintiff's demand. In a bill against a fraudulent grantee of a deceased person, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative: *McLaughlin v. Bank of Potomac*, 7 How. U. S. 220.

65. Equitable Assets.—To maintain a creditor's bill in chancery, in order to reach equitable assets, which are alleged to have been fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set forth which will reasonably sustain the theory of the bill: *Kinder v. Macy*, 7 Cal. 207. A non-negotiable chose in action cannot be impeached in the hands of an innocent assignee by the creditors of those making such chose in action: *Wright v. Levy*, 12 Id. 257.

No. 486.

viii. *Against Heir, for Debt of Ancestor.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege facts, showing debt of ancestor due, and still unpaid].

II. That on the day of 187., at, said A. B. was owner in fee of certain property hereinafter described, and that on the same day said A. B. died intestate; and that more than years before this action, to wit, on the day of, 187., letters of admin-

istration upon the estate of said A. B. were issued by the Probate Court of County, in this State, appointing one C. D. administrator of all the goods, chattels and credits of said deceased.

III. That the defendant is the sole heir of said deceased, and that the following described premises descended from deceased to him as such [description of premises].

IV. That the personal assets of said A. B. were not sufficient to pay and discharge the plaintiff's demand.

Wherefore plaintiff demands judgment:

1. That said premises be sold, and the sum of dollars, with interest thereon from the day of, 187., together with costs of this action, be paid to the plaintiff out of the proceeds thereof.

NOTE.--The circumstances permitting such an action could rarely, if ever, arise in California: See sec. 1493, Code C. P.

66. **Allegation where Heir or Devisee has Alienated the Land.**—That on the day of, 187., the defendant conveyed the said premises to one G. H., and that the premises so conveyed by him were reasonably worth dollars.

67. **Debt Due.**—It is not necessary to aver a debt due in the ancestor's life-time: *Parsons v. Parsons*, 5 Cow. 476.

68. **Description of Premises.**—The premises should be described with reasonable certainty: *Sharp v. Sharp*, 3 Wend. 278. And if the plaintiff is unable to ascertain the description of the lands which have been inherited, the fact should be stated: *Parsons v. Browne*, 7 Paige, 354.

69. **Executors.**—Bill filed by a judgment-creditor of J., upon order of court permitting it, against the defendants as executors. Bill avers that the will of deceased "directed, by written or oral instructions," the executors to sell certain cattle, and retain the proceeds for the use and benefit of J., after first discharging his then debts; and it is also declared that he, the testator, had made a secret assignment for J., which the executor would carry into effect according to his instructions, when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: *Held*, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader, and that there is no law giving effect to an oral instruction of a testator as a will or part of a will; and that the creditors of J. can have no more rights than J. himself: *Sparks v. De la Guerra*, 14 Cal. 111.

70. **Heirs and Devisees.**—In suing the heirs and devisees jointly, it must be averred that the real estate descended is insufficient: *Schermerhorn v. Barhydt* 9 Paige, 28. To similar effect: *Wambaugh v. Gates*, 1 How. App. Cas. 247; affirming S. C., 11 Paige, 505.

71. **Joinder of Parties.**—See "Parties," vol. i, p. 46 *et seq.* The heirs and personal representatives cannot be joined: *Stuart v. Kissam*, 11 Barb.

271. The defendant cannot, in one count, be charged both as heir and as next of kin: *Gere v. Clark*, 6 Hill, 350.

72. Liability of Heirs.—This subject is treated in *Van Deusen v. Brower*, 6 Cow. 50; *Whitaker v. Young*, 2 Id. 569; *Schermerhorn v. Barhydt*, 9 Paige, 28; and see *Jackson v. Hoag*, 6 Johns. 59; *Purdy v. Doyle*, 1 Paige, 558.

73. Personal Assets Insufficient.—It must be shown that the personal assets of the deceased were insufficient to discharge the debt, before the real property can be reached: *Roe v. Swezey*, 10 Barb. 247; *Mersereau v. Ryeras*, 3 N. Y. 261. But where the defendant is not sued as heir, but on a special promise, no averment of assets is necessary: *Elting v. Vanderlyn*, 4 Johns. 237.

74. Right of Recovery.—The special facts on which the plaintiff's right to recover depends, should be alleged: *Gere v. Clarke*, 6 Hill, 350; and see *Mersereau v. Ryeras*, 3 N. Y. 261.

No. 487.

ix. *Against Next of Kin, for Debt of Ancestor.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege cause of action, and show debt still unpaid.]

II. That on the day of, 187., at, said A. B. died intestate; and that on the day of, 187., letters of administration upon the estate of said A. B. were granted to C. D. by an order made by the Probate Court of the County of, in this State, appointing said C. D. administrator of the estate of said deceased.

III. That before the commencement of this action, said administrator paid over assets of the estate to the defendant, who is one of the next of kin of the deceased, amounting to the sum of dollars.

[Demand of Judgment.]

No. 488.

x. *Against Legatee, for Debt of Decedent.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege cause of action, and show debt still unpaid.]

II. That on the day of, 187., at, said A. B. died, leaving a last will and testament, by which one C. D. was appointed sole executor thereof, and that on the day of, 187., said will was duly proved and admitted to probate in the Probate Court of County, in this State, and letters testamentary were thereupon issued to said C. D. by said Probate Court.

III. That by said will the said A. B. bequeathed a legacy of dollars to the defendant.

IV. That before the commencement of this action said executor paid over to the defendant, as such legatee, the amount of said legacy [or dollars, being part of said legacy], out of the assets of said estate.

[*Demand of Judgment.*]

CHAPTER II.

FOR DISSOLUTION OF PARTNERSHIP.

No. 489.

i. *Common Form.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187., at....., he entered into partnership with defendant, under an agreement [of which a copy is hereto annexed, marked "Exhibit A"].

II. That on the.....day of....., 187., the defendant took exclusive possession of the partnership books and stock, and ever since has prevented the plaintiff from having access to the same, or from participating in any manner in the partnership business, [or state any facts constituting a breach of the agreement].

Wherefore the plaintiff demands judgment:

1. That the said partnership be dissolved.
2. That a receiver of the property thereof be appointed, with the usual powers.
3. That the defendant be restrained, by injunction, from interfering with the said property.
4. That the same be applied: First, to the payment of the partnership debts; and the remainder be divided between the parties, according to their respective rights.

NOTE.—The prayer is, of course, changed to suit the facts in each case.

1. Accounting.—Whenever a partner is entitled to a dissolution, the taking of an account is necessary, and follows as a matter of course: *Cottle v. Leitch*, 35 Cal. 434. Claim for partnership accounting, and a claim against a third party fraudulently holding part of partnership's property, may be united: *Wade v. Rusher*, 4 Bosw. 537; see note 33, *post*.

2. Adverse Proceedings.—Where one partner has filed his bill for a dissolution of partnership and the appointment of a receiver, until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference: *Adams v. Hackett*, 7 Cal. 187; *Adams v. Woods*, 8 Id. 152; 9 Id. 24; *Naglee v. Lyman*, 14 Id. 450.

3. Allegation of Partnership.—Partnership must be proven like any other fact, and cannot be established by mere surmise or innuendo: *Hudson v. Simon*, 6 Cal. 453. In a proceeding for the settlement of partnership accounts, a petition which does not show the existence of the partnership, and did not contain any statement of the account by the plaintiff, nor ask for a statement by the defendant, was held defective: *Pope v. Salzman*, 35 Mo. 362.

4. Books of Partnership.—The books of a liquidating partnership are in the *quasi* possession of the law, and must be placed in the hands of a receiver in all circumstances: *Succession of Andrew*, 16 La. An. 197.

5. Cause must be Shown.—A mere desire of one of the partners is not sufficient to authorize the court to decree a dissolution of the same, but cause must be shown: *Bradley v. Harkness*, 26 Cal. 69. But see Civil Code, sec. 2450.

6. College Corporation.—A college corporation may, at common law, dissolve itself by a surrender of its franchise and the transfer of its corporate property by proper proceedings: *People v. Pres. and Trust. Coll. of Cal.*, 38 Cal. 166.

7. Corporations.—Of the rules of pleading in actions brought to procure the dissolution of corporations: See *The People ex rel. Marshall v. The Ravenswood etc. Turnpike and Bridge Co.*, 20 Barb. 518. In New York, a complaint which asks for a receiver of the property of a corporation which is sued, without asking for its dissolution, and for an injunction against its trustees, without making them parties, or even stating who they are, is defective and demurrable: *Reid v. The Evergreens*, 21 How. Pr. 319. In California the involuntary dissolution of corporations is provided for by the Code of Civil Procedure, part II, title X, chap. V, and the voluntary dissolution by the same code, secs. 1227 to 1233: See Civil Code, secs. 399–400.

8. Correcting Errors.—A court of equity may correct errors in the settlement of partnership affairs, where they arise from misrepresentations innocently made by one or more of the firm: *Stephens v. Orman*, 10 Fla. 9.

9. Decree.—If, in an action to wind up a partnership between plaintiff and defendant, in corporation stock, standing in the name of defendant, it appears that plaintiff has agreed that the defendant may retain certain shares until a demand against the estate is settled, the court should not direct a conveyance of those shares without proof that the demand has been settled: *Harper v. Lamping*, 33 Cal. 641. The decree should not order the private sale of firm property: *Jones v. Thompson*, 12 Cal. 191. Where the complaint alleges that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends before final distribution of the assets: *O'Connor v. Stark*, 2 Cal. 153. The judgment should not be in the alternative, requiring the defendant to either transfer to the plaintiff his part thereof, or pay him a certain sum of money, but should direct a

division in kind, or a sale and division of the proceeds: *Harper v. Lamping*, 33 Cal. 641. Where a bill is filed to settle the affairs of a partnership, the partnership transactions of each and all the partners should be taken into account, and the decree should include all these so as to leave nothing open for future litigation: *Griggs v. Clark*, 23 Cal. 427; *Raymond v. Came*, 45 N. H. 201.

10. Dissolution—Partial.—A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject, however, to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution: Civil Code, sec. 2451.

11. Dissolution—Total.—In California, a general partnership is dissolved as to all the partners: 1. By lapse of the time prescribed by agreement for its duration; 2. By the expressed will of any partner, if there is no such agreement; 3. By the death of a partner; 4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property; 5. By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or, 6. By a judgment of dissolution: Civil Code, sec. 2450. Where there are several members of a partnership, and one of them, even by consent, retires from the firm, this dissolution necessarily severs the copartnership relations of each of its members: *Ross v. Cornell*, 45 Cal. 133. The two or more members who remain in the firm cannot maintain a joint action at law against the member who retired: *Id.*; *Miller v. Brigham*, 50 Id. 615. For a case depending on special facts, see *Eagle v. Bucher*, 6 Ohio St. 295. The bankruptcy of one partner *ipso facto* dissolves the partnership, and the assignee is tenant in common with the solvent partner in the joint stock: *Wilkins v. Davis*, 15 Bankr. Reg. 60.

12. Dissolution, when Partner entitled to.—A general partner is entitled to a judgment of dissolution: 1. When he or another partner becomes legally incapable of contracting; 2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or, 3. When the business of the partnership can be carried on only at a permanent loss: Civil Code, sec. 2452. A renunciation of the partnership by one partner will entitle his copartners to dissolve the partnership: *Id.*, secs. 2417, 2418. Violent and lasting dissensions between the members of a firm, is a ground upon which a court of equity will decree a dissolution: *Lafond v. Deems*, 52 How. Pr. R. 41. So, too, when the whole scheme is found to be visionary, or founded upon erroneous principles: *Id.*

13. Distribution of Assets.—The filing of a bill by one partner against his copartners for dissolution and account, and praying for an injunction and receiver, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution: *Adams v. Woods*, 9 Cal. 24.

14. Exclusion of a Member.—Where a voluntary association for mutual relief excluded plaintiffs from the association, because of their refusal to take an oath not required by the constitution or by-laws, and foreign to the objects thereof, a suit for dissolution might be maintained: *Gorman v. Russell*, 14 Cal. 531. But where the association, on being advised of its duties, re-

scinded the resolution, the court will be authorized to refuse the decree: *Id.* 18 Cal. 688.

15. Joint Account Transaction.—Where the complaint alleged that the plaintiff composed one firm and the defendant another, and entered into “an arrangement to transact business in sugars on joint account,” and alleged that plaintiffs had shipped to defendants sugar to an amount greater than they had drawn bills against, that defendants had failed and assigned to defendant B., that assignment was fraudulent and void, and prayed judgment for excess specified, for half of the profits and appointment of a receiver, and other proper relief; *Held*, that though inartificial, it was sufficient: *Davis v. Grove*, 27 How. Pr. 70.

16. Form of Allegation.—The proper form in such case should allege that this was a partnership transaction; that credit of both parties was involved; that the joint names and credits of two firms, the one as drawers and the other as acceptors, were the means by which they procured the moneys that bought the sugars; that the same were bought on joint account by them as partners in the transaction; that a large amount of the sugar and proceeds thereof were on hand; that the joint indebtedness for these sugars was outstanding, and should be paid out of the joint property arising out of the transaction, and that an accounting should be had between the parties, and that an injunction be granted and a receiver appointed: *Davis v. Grove*, 27 How. Pr. 70.

17. Joint Stock Association.—A portion of the company cannot, contrary to the articles of association, dissolve the company at their will and pleasure, but if it is found impracticable to keep the company together, or to prosecute successfully the contemplated enterprise, the Court may decree a dissolution and the distribution of its effects: *Von Schmidt v. Huntington*, 1 Cal. 55. A joint stock association, formed for a definite period, cannot be voluntarily dissolved, except by the unanimous consent of all the stockholders: *Von Schmidt v. Huntington*, 1 Cal. 55. Where there is nothing in the constitution of a joint stock company to regulate the remedies of shareholders, the general law of partnership must govern them: *Bullard v. Kinney*, 10 Cal. 60. A voluntary association is not dissolved by the withdrawal of two of its members, upon their objecting to a purchase of land, and refusing to pay assessments, or to co-operate in its business and to participate in its proceedings: *Troy Factory v. Corning*, 45 Barb. 231.

18. Jurisdiction.—A stipulation in articles of partnership, that all matters of controversy shall be submitted to arbitration, does not take away the jurisdiction of equity to decree a dissolution: *Meaher v. Cox*, 37 Ala. 201.

19. Receiver.—A partner filing a bill for dissolution, and to enjoin the copartnership from continuing the business in the name and on the credit of the partnership, is, nevertheless, not entitled to have a receiver appointed, unless the copartner has been guilty of a breach of duty, or of the partnership contract: *Wilson v. Fitcher*, 3 Stockt. (N. J.) 71. The appointment of a receiver is only a means to attain the end contemplated by the plaintiff: *Adams v. Woods*, 8 Cal. 306.

20. Relief, Prayer for.—A prayer for general relief, in a bill by one partner against another, is sufficient to authorize a sale of the partnership property: *Lyman v. Lyman*, 2 Paine, 11.

21. Surrender of Franchise.—The trustees of a corporation have the power to surrender the franchise, after its debts are paid, and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property of the corporation would vest in the state: 2 Kent. Com. 386; Angell & Ames on Corp., sec. 195. And so would such real estate as was acquired by the corporation for value, the vendor having no interest in the appropriation of the property to any specific object, and no reversion where the succession fails: *People v. Pres. and Trus. of College of Cal.*, 38 Cal. 166; *Bacon v. Robertson*, 18 How. U. S. 480.

22. Tenants in Common of Mill —Where the relation of tenants in common in a mill was established between two persons, and it appeared that one had the entire management of the concern, occasionally paying some of the proceeds to his co-tenant, but that no settlement had taken place: *Held*, that though there was no partnership shown, it was a proper case for an accounting between the parties: *Mitchell v. O'Neal*, 4 Nev. Rep. 504.

23. Water Ditch.—A complaint in an action for an accounting, touching the affairs, rents and proceeds of a water ditch, and for a sale of the property and a division of the proceeds, which first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of the affairs of a partnership, or for a partition: *Bradley v. Harkness*, 26 Cal. 69. The complaint in this case alleging that plaintiff and defendant are members of a joint stock company, known as the "Miners' Ditch Company;" that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc., entitles plaintiff to a relief by a decree affirming his interest and directing an account: *Smith v. Fagan*, 17 Cal. 178.

24. Winding up Affairs.—A partner is always entitled to have the partnership wound up by a sale of all the property, as the best mode of ascertaining its value: *Lyman v. Lyman*, 2 Paine, 11. Where a partnership is liable to be dissolved at the will of either party, the consequence of such dissolution is to throw the winding up of their partnership affairs into a court of equity, unless they agree on the mode of settlement: *Stevens v. Yeatman*, 19 Md. 480. A court of equity will dissolve a partnership when the respondent in a suit for dissolution does not intend to carry out one of the terms of the partnership agreement: *Meaher v. Cox*, 37 Ala. 201. That one partner cannot by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership or extricate himself from the responsibilities of a partner, either in respect to his associates or to third persons, but the partnership may be put an end to by the act of God, or by operation of law: *Pearpoint v. Graham*, 4 Wash. C. Ct. 232. In the voluntary winding up of a joint stock company, claim made to the liquidator on bank notes and drafts current at the time of the stoppage is a sufficient demand for payment, and interest runs from the date of such claim: *In re East of England Banking Co.* Law Rep. 4 Ch. 14.

*No. 490.*ii. *On the Ground of Assignment by Partner.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as before].

II. That on the day of, 187., at, the defendant A. B., without the knowledge or assent of the plaintiff, assigned and transferred to the defendant C. D., all his interest in said partnership, and all his right, title and interest to any and all property of said firm.

[Demand of Judgment.]

25. Dissolution by Assignment.—The assignment of all joint interest in a patent, by one joint owner, is a dissolution of the partnership for working it: *Parkhurst v. Kinsman*, 1 Blatchf. 488. A partnership is dissolved by the *cessio bonorum* made by one of the members, and the solvent partner being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs: *Saloy v. Albrecht*, 17 La. An. 75.

26. Mining Partnership.—One of the partners in a mining partnership may convey his interest in the mine and business, without dissolving the partnership: *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Id. 198; Civil Code Cal., sec. 2516.

27. Sale to Stranger.—Evidence that a partner sold to a stranger his interest in a stock of goods belonging to the firm, but not in the notes, accounts and other assets of the firm, and that the purchaser formed a partnership with the seller's partners, is not sufficient proof of the dissolution of the original partnership: *Cody v. Cody*, 31 Ga. 619. Where one partner retires from business, assigning to the other all his interest in the partnership's property, the remaining partner acquires the same dominion as if it had ever been his own separate property: *Dimon v. Hazard*, 32 N. Y. 65. Where one partner sells out his interest in the partnership, it works a dissolution of the same: *Bradley v. Harkness*, 26 Cal. 69. The introduction of new members into a firm works a dissolution of the pre-existing copartnership, except for the purpose of collecting the assets and paying the debts of the concern: *Mudd v. Bast*, 34 Mo. 465.

*No. 491.*iii. *Upon Notice of Expiration of Term of Copartnership.*

I. [Allege partnership as in preceding forms.]

II. That on the day of, 187., the defendant [or the plaintiff], pursuant to the provision of said agreement, gave to the [defendant or plaintiff] a written notice of his intention to dissolve said agreement, a copy of which notice, and also of said agreement, is hereto annexed.

[Demand of Judgment.]

28. Actual Notice.—Where the partnership agreement provides for a dissolution upon notice, any notice is sufficient which clearly fulfills the intention of the agreement.

29. Mutual Consent.—Where a partnership is dissolved by mutual consent, a court will assume control of its business and appoint a receiver only when it appears necessary, to protect the interest of the parties, and not as a matter of course: *Cox v. Peters*, 2 Beasley N. J. 39. In New York, the dissolution of a limited partnership by filing a notice with the county clerk, and by publication for four weeks (1 Rev. Stat. 767, sec. 24), does not become operative until the complete performance of both those acts: *Fanshawe v. Lane*, 16 Abb. Pr. 71. Such notice is necessary to exonerate the members of a firm from liability on a promissory note made in its name after dissolution: *City Bk. of Brooklyn v. McChesney*, 20 N.Y. 240; *City Bank of Brooklyn v. Dearborn*, Id. 244. When notice of change of firm's name is relied on to exonerate retiring partner, such change must show that he has retired from the business: *American Linen Thread Co. v. Wortendyke*, 24 N.Y. 550.

30. Offer to Dissolve.—Allegation by one partner, contained in a pleading, of his desire to dissolve, is not equivalent to an acceptance of an offer to dissolve made by the other party a month previous: *Bank of N.Y. v. Vanderhorst*, 32 N.Y. 553.

31. When Dissolution may be Obtained.—A partnership that has no limit in respect to time may be dissolved by either party at will: Chit. on Cont. 208. Yet where parties have agreed to enter into such a partnership, the refusal of one of them to enter is a good cause of action to the other: *Skinner v. Tinker*, 34 Barb. 333. A provision in articles of copartnership prescribing a definite period for its continuance, is sufficient, without any prohibition of an earlier dissolution, to prevent either party from dissolving it at will: *Smith v. Mulock*, 1 Abb. Pr. (N. S.) 374.

No. 492.

iv. *On the Ground of Bankruptcy of Partner.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as before.]

II. That on the day of, 187., at, the defendant A. B. was declared a bankrupt by the United States District Court for the District of California, in a certain proceeding therein, wherein C. D. was petitioner and the said A. B. was defendant, and afterwards the defendant E. F. was regularly chosen as the assignee of said A. B. and gave bond and qualified as such, and by virtue of the assignment so made to said E. F. by said A. B., and of the proceedings in said cause, said E. F. is tenant in common with the plaintiff in the property and assets of said firm.

[Demand for Judgment of Dissolution, and an Accounting, etc.]

32. Bankruptcy.—A decree of bankruptcy against a member of a firm operates as a dissolution of the partnership, and the assignee becomes tenant

in common with the solvent partner: *Wilkins v. Davis*, 15 Bankr. Reg. 60. The joint property remains in the hands of the solvent partner clothed with a trust. He can enter into no new partnership engagement, but his whole authority is limited to settling and closing the partnership concerns: 3 Kent's Com. 59; Story on Part. secs. 1, 328, 341, 407. And ordinarily the assignee has no right to interfere with the administration of the effects of the firm: *Matter of Norcross*, 1 N. Y. Leg. Obs. 100.

No. 493.

v. *On the Ground of Misappropriation of Funds.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as before.]

II. That since the commencement of said partnership, the defendant has, from time to time, applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, to wit, the sum of dollars.

III. That the defendant still continues to collect the copartnership debts and appropriate the money to his own use, greatly exceeding the proportion thereof to which he is entitled, to the detriment of the business of said firm, and the injury of the plaintiff.

Wherefore the plaintiff demands judgment:

1. That the said copartnership may be dissolved.

2. That a receiver of the property thereof be appointed, with the usual powers.

3. That an account be taken of all the said copartnership dealings and transactions, from the commencement thereof, and of the money received and paid by the plaintiff and defendant respectively in relation thereto.

4. That the defendant be restrained by injunction from interfering with the debts or moneys or property or effects of said partnership.

5. That the property of the firm, real and personal, be sold, and the copartnership debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests.

6. And for such other and further relief as may be just, with the costs of this action.

33. False Entry in Books.—Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his copartner of a portion of the partnership receipts, and retains the same to

his own use, the partner defrauded is entitled to a dissolution and an accounting: *Cottle v. Leitch*, 35 Cal. 434. The taking of an account follows dissolution as a matter of course: *Id.* If in such case there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a re-accounting prior to the commencement of the action: *Id.*

No. 494.

vi. *By Administrator, for Dissolution of Copartnership, on the Ground of Death of Partner.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on theday of, 187., at, one A. B. entered into partnership with the defendant, under an agreement of which the following is a copy: [Copy agreement.]

II. That the said copartnership business was entered upon pursuant to said agreement, and continued to be carried on under and pursuant to the same up to the time of the death of the said A. B.

III. That on theday of, 187., at, the said A. B. died.

IV. That at the time of the death of the said A. B. there was on hand partnership assets to the amount or value of aboutdollars, as follows: [Specify personal property and its value; real property, describing it and its value, and other property, as book accounts, etc., and their value.]

V. [Allege appointment of plaintiff as executor or as administrator, as in Form No. 56.]

VI. That ever since the death of said A. B. the said defendant has continued in the possession of the said real and personal property, and to manage and carry on said business, and dispose of said property, and to collect the debts and things in action, and to pay debts and liabilities of said firm out of the avails thereof; and that he has so collected large sums, the amount of which the plaintiff does not know and cannot ascertain.

VII. That the defendant has not paid over to the plaintiff, as administrator of the estate of said A. B., any money or other proceeds of said copartnership since the death of said A. B., nor has he assigned, transferred, or delivered over

to said plaintiff, as administrator, any of the assets, securities, or property of said copartnership.

VIII. That the defendant is insolvent, and is unable to give any security for payment to the plaintiff as representative of said A. B. for the value of the interest of said A. B. in said copartnership.

IX. That the plaintiff has requested of said defendant a statement and account of said copartnership transactions, which the defendant refused to give.

Wherefore, the plaintiff demands: .

1. That an account may be taken of all the said copartnership dealings and transactions, from the time of the commencement thereof to the time of dissolution by the death of said A. B., and of the moneys received and paid by the said partners respectively in regard thereto, and that the defendant account for all dealings with and transactions in regard to the property, assets, and effects of said firm since its dissolution by the death of said A. B., and the property sold or disposed of by him, either as surviving partner or otherwise, and of the moneys collected and received and paid out by him on account thereof.

2. That the defendant may be adjudged to pay the plaintiff, as administrator as aforesaid, the residue which shall appear to be due to the estate of said A. B., after payment of all the debts of the firm.

3. That a receiver be appointed, with the usual powers and duties, and under the usual directions; and that the defendant may be restrained by order of this court from disposing of or in any manner interfering with the property and effects of said firm, or from collecting or receiving the copartnership debts or other moneys coming to said firm.

4. For such other or further relief as may be just, with costs of this action.

NOTE.—Under the California statute, a surviving partner has the absolute right to settle up the affairs of the copartnership, subject always to judicial inquiry; but the executor or administrator of the deceased partner may maintain against the surviving partner any action which the decedent could have maintained: Code C. P., sec. 1585.

34. **Compensation Allowed.**—Where the partnership has been carried on some time after the dissolution by death, and such continuance has proved beneficial, he may be allowed compensation for his services, to be deducted from the profits: *Griggs v. Clark*, 23 Cal. 427.

35. Credit Allowed.—A surviving partner who administers upon the partnership affairs, may be allowed a credit on his inventory, for a debt due by the deceased partner, and for a debt due by himself to the firm, at the same time both debtors being insolvent: *Crow v. Weidner*, 36 Mo. 412.

36. Dissolution by Death.—The partnership is dissolved by death: *Scholefield v. Eichelberger*, 7 Pet. 586; *Burwell v. Mandeville*, 2 How. U. S. 560. The death of a partner is not a revocation of the agency: *Bank of N. Y. v. Vanderhorst*, 32 N. Y. 553.

37. Rights of Survivor.—When a partnership is dissolved by the death of one of its members, the surviving partner is to wind up the affairs of the partnership, pay its debts out of its assets, and divide the residue among those entitled to it: *Gleason v. White*, 34 Cal. 258; *Loeschigk v. Addison*, 19 Abb. Pr. 169. He has the exclusive right of possession, and absolute power of disposing of the assets: Cal. Code C. P., sec. 1585; *Allen v. Hill*, 16 Cal. 113. He may transfer the title to a chose in action of the firm; and after such transfer the remedy must be prosecuted in the name of the real party in interest: *Roy v. Vilas*, 18 Wis. 169. In Louisiana, on the death of a partner, his interest in the assets of the concern become vested in his heirs at law, and the surviving partners can only acquire that interest by transfer and assignment from the heirs, and thereby acquire the right to sue for a debt in their own name: *Skipworth v. Lea*, 16 La. An. 247. The right of a surviving partner to administer the partnership effects is not an absolute right, but depends upon the consent of the heirs: *McKowen v. McGuire*, 15 La. An. 637.

CHAPTER III.

DIVORCE.

No. 495.

i. *On the Ground of Adultery.*

[TITLE.]

The plaintiff complains, and alleges:

I. That plaintiff and defendant intermarried at....., in the County of....., State of....., on or about theday of....., 187., and ever since have been, and now are husband and wife.

II. That the plaintiff is and has been a resident of the State of....., for the period of.....months immediately preceding the commencement of this action.

III. And plaintiff, on her information and belief, alleges that the defendant did, on the.....day of....., 187., commit adultery with one....., at..... [name the place, and describe the house].

IV. Plaintiff further alleges, on her information and belief, that defendant, on divers days and times between said last mentioned day and the commencement of this action, has committed adultery with the said....., and is now living and cohabiting with the said....., at the place and in the house above mentioned.

V. Plaintiff further alleges that each and all of said acts of adultery were committed without the consent, connivance, procurement, or previous knowledge of plaintiff, and that she has not lived or cohabited with defendant since she became cognizant of the commission by the defendant of the several acts of adultery complained of.

VI. Plaintiff further alleges that the defendant is the owner and possessed of the following described real and personal property: [particularly describe it, and state its value], all of which has been acquired by him since their said marriage.

VII. Plaintiff alleges that the rents, issues, and profits of said real property are of the monthly value of about.... dollars, in United States gold coin.

VIII. Plaintiff further alleges that there are now living of the issue of their said marriage.....children. [State their sex, names, and ages.]

IX. Plaintiff further alleges that she is in indigent circumstances, and wholly dependent upon her own labor for her support [or that she is in ill health, or too aged to earn her livelihood, and is dependent on the charity of her friends for support].

Wherefore plaintiff demands judgment:

1. That the bonds of matrimony between herself and the defendant be dissolved, and that the custody of the said minor children be awarded to the plaintiff.

2. That such portion of the common property be allowed and set apart to plaintiff as shall be equitable and just, and that the defendant be enjoined and restrained from disposing of or in any manner incumbering the property herein described.

3. That the defendant may be required to pay a reasonable sum into court, to defray the expenses of this action, and for counsel fees; and that he pay to plaintiff such further sum for alimony as to this court may seem just, for her

support during the pendency of this action. Plaintiff prays for general relief.

NOTE—Statutory Grounds for Divorce.—In California, divorces may be granted for any of the following causes: 1. Adultery; 2. Extreme cruelty; 3. Willful desertion; 4. Willful neglect; 5. Habitual intemperance; 6. Conviction of felony: Civil Code, sec. 92.

1. Adultery Defined.—Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife: Civil Code, sec. 93; Bishop on Mar. & Div. sec. 703. It can only be committed by a married person, but it is immaterial whether the *particeps criminis* is married or single: *Id.*; *Commonwealth v. Call*, 21 Pick. 509.

2. Adultery, how Alleged.—The allegation of adultery must not be too general: *Wood v. Wood*, 2 Paige, 108; *Kane v. Kane*, 3 Edw. 389. But a failure to demur is a waiver of such objection: Consult *Conant v. Conant*, 10 Cal. 249; see, also, *Ingersoll v. Ingersoll*, 1 Code R. 102. The words, "committed adultery," are sufficiently descriptive of the act. The name of the person with whom the adultery is charged to have been committed must be given; if it is not known, that fact must be stated: *Germond v. Germond*, 6 Johns. Ch. 347. Time and place should be stated with reasonable certainty, so as to enable the defendant to meet it on the trial: *Conant v. Conant*, 10 Cal. 249; *Heyde v. Heyde*, 4 Sandf. Ch. 692; *Farr v. Farr*, 34 Miss. 597-601; *Wood v. Wood*, 2 Paige, 108-113. A defect in this particular should be taken advantage of by demurrer, and if no demurrer were interposed, the objection of the want of certainty was held to be waived: *Conant v. Conant*, *supra*. In the case of *Adams v. Adams*, 16 Pick. 254, the respondent moved to quash the libel for uncertainty in this respect, or that libellant file a bill of particulars within a reasonable time. The Court ordered the bill of particulars to be filed: See, also, *Garratt v. Garratt*, 4 Yeates (Pa.) 244. The better course would be to amend. There are cases, however, when neither person, time nor place can be alleged, as where the wife discovers that the husband has contracted, since the marriage, venereal disease; or the husband has been absent for a year, and upon his return finds his wife pregnant. In these cases, besides stating the adultery in general terms, the peculiar nature of the proof should be referred to, for the double purpose of excusing the want of a more specific allegation, and of notifying the defendant of the nature of the charge and of the proof by which it will be supported: Bishop on Marriage and Divorce, vol. 2, sec. 610. As to pleading habitual adultery, see *Id.* sec. 611; *Marble v. Marble*, 36 Mich. 386.

3. Allegation of Adulterous Intercourse.—That the defendant has committed adultery with one A. B., and ever since the day of, 187., has been living in adulterous intercourse with him [her], at the house known as, on street, in

4. Allegation where Name is Unknown.—That on the day of, 187., at the house known as, on street, in the city of, the defendant committed adultery with a man [or a woman] whose name is unknown to this plaintiff. This allegation is sustained by *Germond v. Germond*, 6 Johns. Ch. 347. The place should be distinctly stated: *Heyde v. Heyde*, 4 Sandf. 692; *Kane v. Kane*, 3 Edw. 389; *Mitchell v. Mitchell*, 61 N. Y. 398.

5. Averments Generally.—A complaint for divorce should contain allegations of every fact the existence of which is made necessary by the statute in order to the granting of the divorce: *White v. White*, 45 N. H. 121. Residence of the plaintiff must be averred: *Bennett v. Bennett*, 28 Cal. 599; Civ. Code, sec. 128. Connivance or collusion should be negatived in the complaint, though it seems not to be required by any express language of the code.

6. Alimony—Maryland Rule.—In Maryland, courts of chancery exercise jurisdiction to grant alimony to the wife, but only upon allegation of facts which would be a sufficient foundation in England for granting a divorce *a mensa et thoro*: *Willingford v. Willingford*, 6 Har. and J. 485; *Helms v. Francis*, 2 Bland. Ch. R. 568. And New York follows the procedure of the English courts: 4 Paige Ch. R. 74; *Galland v. Galland*, 38 Cal. 265.

7. Alimony Pendente Lite—The court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses: *Ex parte Perkins*, 18 Cal. 60; see Cal. Civ. Code, sec. 137. And it may be enforced by imprisonment for contempt: *Id.* Alimony *pendente lite* may be allowed without statutory authority, the power to grant it being incident to the power to grant the divorce: *Petrie v. People*, 40 Ill. 334. It was allotted on the average annual earnings of a husband, a master mariner, though at the time of his answering the petition for alimony he was temporarily out of employment: *Thompson v. Thompson*, Law Rep. 1 P. & D. 553. In a suit by wife against the husband for divorce, he is chargeable with the real value of such professional services as the wife may procure: *Sprayberry v. Merk*, 30 Ga. 81; *Armstrong v. Armstrong*, 35 Ill. 109. What allowance a husband, who sues his wife for a divorce, will be required to make to her for the expenses of her defense, by the courts of Washington territory, see *Thorndike v. Thorndike*, 1 Wash. Ter. 198. Where husband and wife have been living apart for many years, and the wife has supported herself, and is still able to do so, alimony *pendente lite* will not be allowed: *Burrows v. Burrows*, Law Rep. 1 P. & D. 554; *George v. George*, *Id.* The allowance is within the discretion of the court: *De Llamosas v. De Llamosas*, 62 N. Y. 618. Proof of the amount of labor, or the value of services, of counsel is not necessary to sustain an allowance for counsel fees. The court may determine, from its own experience, and from the facts and circumstances of the case, as disclosed by the papers, what is a reasonable fee: *Id.*

8. Appeal.—In a divorce case brought by the husband, an appeal taken by the wife from a decree against her, within the statutory period, but after the death of the complainant, where the husband, at his death, left considerable estate, is held to be authorized by the Michigan statute: *Shafer v. Shafer*, 30 Mich. 163. The representatives and heirs of the deceased complainant must be brought in as parties, before the hearing on appeal: *Id.* The administrator will not be compelled to pay alimony on such appeal: *Id.* Where the chancellor refuses a divorce, because proof is not made of the plaintiff's residence, but grants relief as to other matters embraced in the bill, the appellate court will, at the instance of the plaintiff, reverse the decree as to the divorce, and dismiss the bill on that point without prejudice: *Edwards v. Edwards*, 30 Ala. 394. To justify this court in reversing the judgment of the court below refusing a divorce, under the clause giving "discretionary powers," etc., a very clear case must be shown of an improper exercise of that power: *Ruby v. Ruby*, 29 Ind. 174. A decree for divorce *a vinculo* is

final, and an appeal lies therefrom, notwithstanding a reference to the commissioner for the determination of alimony pending the suit: *Shaw v. Shaw*, 9 Mich. 164.

9. Common Property.—In the absence of an allegation in a complaint for divorce, that there is common property, the presumption would be that there was none: *Kashaw v. Kashaw*, 3 Cal. 312. It is proper to declare, for the information of the court, in what the common property consists, its nature and value: *Id.* The statute which prescribes what shall be common property, as between husband and wife, and how it shall be divided in case of a divorce, is a mere regulation of a right of property, and does not provide a new right of action. A complaint for relief under this statute need not, therefore, comply with the rules governing the forms of pleadings in statutory actions: *Gimmy v. Doane*, 22 Cal. 635. The failure of a complaint, in an action for a division of common property, to state with sufficient particularity the facts showing the character of the property, is a defect of form which must be objected to by demurrer: *Id.*

10. Common Property, Disposition of.—In an action for divorce for extreme cruelty, where nothing is said in the pleading about the disposition of the common property, it is error to award it all to one of the parties: *Howe v. Howe*, 4 Nev. 469; see Civil Code Cal. sec. 146. Where a divorce is granted on the ground of extreme cruelty, or adultery, the guilty party is entitled to receive only so much of the community property as the court may deem just under the facts of the case; and the discretion of the court in dividing the property is subject to revision on appeal: *Eslinger v. Eslinger*, 47 Cal. 62; see, also, Civil Code, sec. 148. The inference to be derived from sections 146 and 147 of the Civil Code is, that if a divorce is granted on the ground of adultery or extreme cruelty, the injured party is entitled to more than half of the common property: *Id.* If the decree does not make any disposition of the common property, and no such question is presented by the pleadings, it will not conclude the parties, or either of them, in respect of their claims to such property: *De Godey v. De Godey*, 39 Id. 157. Any other court than the one rendering the decree of divorce, if otherwise competent, has jurisdiction to determine the disposition of the community property under the statute: *Id.* Where the decree directs that there shall be a division in definite proportions of the community property, the parties become from the time the judgment is rendered, tenants in common, *eo nomine*, in the land theretofore held by them in community: 31 Id. 29.

11. Condonation.—Condonation is a conditional forgiveness, and a repetition revives the condoned injury: *Burr v. Burr*, 10 Paige, 29. And former injuries will be revived by misconduct of a slighter nature than such as to constitute an original ground for a divorce: *Burr v. Burr*, 10 Paige, 20; see, also, *Whispell v. Whispell*, 4 Barb. 217. Condonation of acts of actual violence, blows, etc., may be forfeited or set aside by subsequent words of abuse, so that the wife may sue for a divorce on the ground of the blows, although she could not obtain one for the verbal abuse: *Farnham v. Farnham*, 73 Ill. 497. See on this subject Cal. Civil Code, secs. 111–123.

12. Connivance.—Connivance destroys all claim to remedy by way of divorce: *Myers v. Myers*, 41 Barb. 114; Cal. Civ. Code, secs. 111, 112.

13. Contempt.—An order to pay alimony may be enforced by an attach-

ment for contempt: *Lyon v. Lyon*, 21 Conn. 185; *Wightman v. Wightman*, 45 Ill. 167; *Grimm v. Grimm*, 1 E. D. Smith (N. Y.), 190.

14. Consent.—The court will not proceed on the ground of the consent of the parties to a dissolution of the marriage contract; *Williamson v. Williamson*, 1 Johns. Ch. 488; see Civil Code, sec. 130.

15. Custody of Child.—A wife suing for divorce on the ground of extreme cruelty is entitled to the custody of their female child of tender years: *Price v. Price*, 55 N. Y. 656; *Wand v. Wand*, 14 Cal. 512; see Cal. Civ. Code, sec. 138. There is no error in requiring the husband to maintain a minor child committed to the mother's custody, after a divorce obtained on account of his misconduct: *Armstrong v. Armstrong*, 35 Ill. 109; see, also, Cal. Civ. Code, sec. 139.

16. Default.—A divorce will not be granted upon the default of the defendant without proof of the facts charged: Cal. Civ. Code, sec. 130. Under section 135 of the New York code fixing a time wherein a defendant, "except in an action for divorce," may be allowed to come in and defend, where service of summons was by publication, it was *held*: that the courts were not deprived of the power to open a default in a divorce case, where the summons was so served: *Brown v. Brown*, 58 N. Y. 609. Section 473, Cal. Code C. P., makes no exception as to the power of the court to open a default where the summons was not personally served.

17. Divorce Granted in Another State, when Invalid.—A divorce granted in Indiana, where neither of the parties, in fact, reside at the time, and where there has been no personal service or process within that state upon the defendant, nor authorized appearance for her, is invalid in New York, although the Indiana record recites the residence of the plaintiff in good faith within that state for one year, and shows an appearance for the defendant by one purporting to be an attorney at law in such state: *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 Id. 30.

18. Evidence—Proof.—Adultery may be established by circumstantial evidence: *Matchin v. Matchin*, 6 Barr. 332; Best on Evidence, sec. 441, and cases there cited; *Evans v. Evans*, 41 Cal. 103; *Blake v. Blake*, 70 Ill. 618. Proof of opportunity and equivocal circumstances affords no evidence of adultery in the absence of circumstances tending to show depravity and a guilty purpose: *Id.* The testimony must convince the judicial mind affirmatively, that actual adultery was committed; since nothing short of the carnal act can lay a foundation for divorce: *Hamerton v. Hamerton*, 2 Hag. Ec. 13, 16, 19. But a fundamental principle never to be lost sight of in these cases is, that the act need not be proved in time and place: *Dailey v. Dailey*, Wright (Ohio), 514; *Hammerton v. Hammerton*, *supra*. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion: See *Mulock v. Mulock*, 1 Edw. Ch. 14; *Day v. Day*, 3 Green Ch. 444; *Ferguson v. Ferguson*, 3 Sandf. 307; 17 Abb. Pr. R. 48; *Inskeep v. Inskeep*, 5 Iowa, 204; consult also Bishop on Marriage and Divorce, 5th ed., vol 2, sec. 612 *et seq.* The confessions or admissions of the defendant can be given in evidence: *Evans v. Evans*, 41 Cal. 143. No divorce, however, can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee, but the court must, in addition to any statement or finding of the referee, require proof of the facts

alleged, and such proof, if not taken before the court, must be upon written questions and answers: Civil Code, sec. 130. As to evidence of reputation, when and for what purposes admissible, see 36 Mich. 387; 98 Mass. 535.

19. Foreign Divorces.—As to the grounds for granting a divorce, the *lex fori* governs, and not the law of the place where the marriage was contracted: *Standridge v. Standridge*, 31 Ga. 223; *Thompson v. State*, 28 Ala. 12. After a decree of divorce was rendered in Kentucky, in favor of the husband, the wife brought a bill for alimony in Ohio: *Held*, that a decree for alimony of a court of Ohio, having jurisdiction of the subject-matter, was a valid decree, and enforceable in Kentucky: *Rogers v. Rogers*, 15 B. Mon. (Ky.) 364. A decree of divorce granted by the courts of a state having jurisdiction over the petitioning party as a citizen of the state, is by article 4, section 1 of the Constitution of the United States, valid in all the states: *Ditson v. Ditson*, 4 R. L. 87. By statute (R. L.), the jurisdiction of the court depends upon the residence of the petitioner: *Id.*

20. Improper Familiarities.—In a case of adultery, proof of improper familiarities, not amounting to criminality, was received to characterize the conduct of the party charged; and such proof was allowed of facts which occurred before the time in which the offense was alleged to have been committed: *Lockyer v. Lockyer*, 1 Edm. 107.

21. Injunction.—In an action for divorce brought by a wife, an injunction was allowed upon the complaint to restrain the defendant from removing his property out of the state: *Vermilyea v. Vermilyea*, 14 How. Pr. 470; *Rose v. Rose*, 11 Paige, 169; *Lawrie v. Lawrie*, 9 Id. 234. And where the husband fraudulently assigned his property, both he and his assignee were enjoined from disposing of it: *Questel v. Questel*, Wright's Ohio Rep. 492; see, also, *De Godey v. De Godey*, 39 Cal. 157.

22. Joinder of Counts.—Two or more of the above grounds of divorce may, in California, be united in the same complaint, but they should be separately stated, and demand of judgment should be framed accordingly. But it seems that in New York charges of adultery and of cruel usage, being distinct and independent, and leading to distinct issues and decrees, cannot be united. And the same rule is applied under the code of procedure: *McIntosh v. McIntosh*, 12 How. Pr. 289.

23. Jurisdiction.—In an action for divorce brought by the wife, the judge of the court in which the action is pending has no jurisdiction to hear and determine in the district court of an adjoining county, of the same district, an application by the wife for an allowance, *pendente lite*, and for the custody of the children of the marriage: *Bennett v. Southard*, 35 Cal. 688. It can only be made in the court where the action is pending. In actions for divorce *a vinculo*, the jurisdiction of the court over the subject-matter of the action, and over the parties, in respect to all matters involved in it, terminates with the entry of final judgment therein, save for the enforcement or correction of the judgment: *Kamp v. Kamp*, 59 N. Y. 212.

24. Legitimacy.—When a divorce is granted for the adultery of the wife, the legitimacy of the children begotten of her before the commission of the adultery is not affected; but the legitimacy of the other children of the wife may be determined by the court, upon the evidence in the case: Civil Code, sec. 145.

25. Limitation of Action.—A divorce must be denied under the Cal. Civil Code: 1. When the cause is adultery and the action is not commenced within two years after the act is committed, or after its discovery by the injured party; 2. When the cause is conviction of felony, and the action is not commenced within two years after pardon, or expiration of sentence; 3. In all other cases where there is an unreasonable lapse of time before the commencement of the action: Sec. 124. As to presumptions established by lapse of time, and how they may be rebutted, see *Id.*, secs. 125, 126.

26. Maintenance.—Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband: Civil Code, sec. 136. See generally upon the subject of maintenance or support, how secured and against whom, and what property, enforced: *Id.*, secs. 136 to 148.

27. Marriage, Averment of.—The averment of marriage, if not denied, need not be proven: *Fox v. Fox*, 25 Cal. 587. In suit for divorce on the ground of adultery, the marriage, where it is denied in the answer, must be proved. It will not be inferred from matrimonial cohabitation with the reputation of being married: *Case v. Case*, 17 Cal. 598.

28. Marriage, when Void.—Though a marriage be *ipso facto* void, as where a party was insane, yet it is proper that it should be declared void by a judicial tribunal: 1 Black. Com. 439; 1 Collins on Lun. 554; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Perry v. Perry*, 2 Paige, 501.

29. Name of Adulterer.—The name of the person with whom defendant committed adultery should be given, if known, though, to avoid scandal, it has been held the name need not be given if sufficient certainty can otherwise be had: *Farr v. Farr*, 34 Miss. 597.

30. New Trial.—The rule that where there is a conflict in the evidence the judgment will not be disturbed, is applied in divorce cases: *Matthai v. Matthai*, 49 Cal. 90.

31. Parties.—The wife, in a suit for divorce, may make a party of any one claiming interest in the common property: *Kashaw v. Kashaw*, 3 Cal. 312. In New Hampshire, a bill for divorce cannot be prosecuted by a third person where libellant dies before entry of the bill: *Kimball v. Kimball*, 44 N. H. 122.

32. Residence of Six Months.—The plaintiff must aver and prove—though it is not denied—that he or she has been a *bona fide* resident of this State six months before making the application for a divorce: *Bennett v. Bennett*, 28 Cal. 599. Without such proof, the court has no jurisdiction to grant a divorce: *Id.* A man's residence is that place where his family dwells, or which he makes the chief seat of his affairs and interests: *Matter of Hawley*, 1 Daly, 531. By sec. 129 Cal. Civil Code, it is provided that in actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile, depending upon actual residence. To constitute a residence, within the legal meaning of the term, there must be a settled fixed abode, an intention to remain permanently, at least for a time, for business or other purposes: *Frost v. Brisban*, 19 Wend. 11; *Matter of Hale*, 2 N. Y. Leg. Obs. 139. In New Hampshire, an offense committed when both parties were out of the

jurisdiction of the court is not a ground for divorce: *Frost v. Frost*, 17 N. H. 251.

33. Recrimination.—The doctrine of recrimination, or *compensatio criminum*, is applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds for divorce, are pleadable in bar to such suits, the one to the other, within the principles of the doctrine: *Conant v. Conant*, 10 Cal. 249. To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant: *Id.* Civil Code, secs. 122, 123.

34. Second Action.—A plaintiff may bring a second action for divorce for subsequent acts of adultery. The practice of resorting to supplemental complaint is not compulsory: *Cordier v. Cordier*, 26 How. Pr. 187.

35. Verdict of Jury.—The statute of divorce which authorizes a decree to be “rendered upon full and satisfactory evidence,” requires the evidence to be satisfactory to the judge as well as the jury; and where the verdict was in favor of the plaintiff, but the judgment in favor of the defendant, it will be presumed, in the absence of any statement of facts, that the judge correctly disregarded the verdict: *Haygood v. Haygood*, 25 Texas, 576. The verdict of a jury in a chancery case is only advisory to the chancellor or this court: *Still v. Saunders*, 8 Cal. 281; see, also, *Goode v. Smith*, 13 Id. 84; *Duff v. Fisher*, 15 Id. 376; *Wingate v. Ferris*, 50 Id. 105.

No. 496.

ii. On the Ground of Desertion.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in previous form.]

II. [Allege residence as in previous form.]

III. That on or about the year, the said defendant, disregarding the solemnity of his marriage vow, willfully and without cause deserted and abandoned the plaintiff, and ever since has and still continues so to willfully, and without cause, desert and abandon said plaintiff, and to live separate and apart from her, without any sufficient cause or any reason, and against her will, and without her consent.

[Demand of Judgment.]

NOTE.—Other allegations in regard to custody of children, support and division of common property, according to the facts of the case, can be added, according to the preceding form.

36. Desertion.—Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert: Cal. Civ. Code, sec. 95. Persistent refusal to have matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion: *Id.* sec. 96. Where

one of the parties is induced, through the stratagem or fraud of the other, to be absent, and during such absence the other departs with intent to desert, it is desertion by the latter: *Id.* sec. 97. Departure or absence caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended, is not desertion by the absent party, but is by the other: *Id.* sec. 98. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion: *Id.* sec. 99. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion: *Id.* 101. Desertion may be cured within the statutory period (one year) by a return and offer in good faith to fulfill the marriage contract, and solicitation of condonation; and if the other refuse such offer and condonation, it is desertion from the time of such refusal: *Id.* 102. The wife must abide by the husband's selection of a home, or it is desertion on her part: *Id.* 103. But if the place or mode of living selected by the husband is unreasonably and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her objections are made known to him: *Id.* 104; see *Hardenberg v. Hardenberg*, 14 Cal. 654. Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert, in the mind of the offending party: *Id.*; *Morrison v. Morrison*, 20 Cal. 431. The intent is presumed from proof of the fact of prolonged abandonment without apparent cause: *Id.* The word "willful," as used in the statute concerning divorces, signifies "intentional," and does not imply malice: *Benkert v. Benkert*, 32 *Id.* 467. If the desertion has continued two years (one year) the offer of the offending party to return and live and cohabit with the other, will not defeat an action for divorce, unless the offer is accepted and acted upon: *Id.*

37. Duration of.—To constitute a ground for divorce, willful desertion must continue one year: *Civ. Code*, sec. 107.

38. Voluntary Separation.—Where, on the inability of a husband to support his wife, they separate voluntarily, and she returns to her relatives, the separation is not a willful desertion on his part, though he should cease to correspond with her: *Ingersoll v. Ingersoll*, 49 Penn. St. 249; see, also, *Cal. Civ. Code*, secs. 99, 100 and 101.

No. 497.

iii. *On the Ground of Conviction for Felony.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in preceding forms.]

II. [Allege residence as in preceding forms.]

III. That at the term of Court, in the County of, State of California, and before this action, the defendant was [duly] convicted of a felony, to wit, of the crime of, and [duly] sentenced by the said Court to confinement in the state prison of said State for the term of years, and in pursuance of

the said sentence the defendant is now confined in said state prison [or, if the sentence has expired, or a pardon was granted, omit the words "is now confined in said state prison," and add, "was confined in said state prison," that the period of his sentence therefor terminated on the day of, 187., at which date he was discharged therefrom (or was pardoned)].

[*Demand of Judgment.*]

39. Felony.—A felony is a crime which is punishable with death or by imprisonment in the state prison: Cal. Penal Code, sec. 17.

40. Limitation.—The action for divorce, for this cause, must be brought within two years after a pardon, or the termination of the period of sentence.

No. 498.

iv. *On Grounds of Extreme Cruelty.*

[TITLE.]

I. [Allege marriage as in Form No. 495.]

II. [Allege residence as in Form No. 495.]

III. That since said marriage, the defendant has treated her in a cruel and inhuman manner, and in particular as follows: On the....day of....., 187., at....., the defendant [here state the particular acts of cruelty, specifying date and place for each, and the nature of the act].

[*Demand of Judgment.*]

41. Alimony without Divorce.—The question was decided that a wife, who without cause or provocation is driven from her husband's house, with her infant child, and is wholly without the means of support, may maintain an action against the husband for a reasonable allowance, for the maintenance of herself and child, without coupling with the application a prayer for a divorce: *Galland v. Galland*, 38 Cal. 265. "The doctrine extends through the entire field of our law, as administered alike in the common law, equity, and ecclesiastic tribunals, that in effect whenever the wife is adjudged entitled to live separate from her husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced that he support her while so living; the one adjudication being commensurate in extent with the other, and neither one existing without the other:" See *Galland v. Galland*, *supra*, and cases there cited. In several states, by legislative enactment, an allowance for the separate maintenance of the wife, disconnected with proceedings for a decree of divorce, is authorized: *Galland v. Galland*, *supra*. "We therefore conceive that the chancellor, before the statute and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched, and that those authorities which decide in favor of such jurisdiction ought to prevail:" See Cal. Civ. Code, sec. 136. The same proposition is maintained in *Purcell v. Purcell*, 4 Hen. & Mon. 507; *Almond v. Almond*, 4 Randolph,

662; *Logan v. Logan*, 2 B. Mon. 142; *Prather v. Prather*, 4 Dessaus. 33; *Rhame v. Rhame*, 1 McCord Ch. R. 197; *Glover v. Glover*, 16 Ala. R. 446. It is better, say our court in the above case, to abandon the subterfuge to which courts have sometimes resorted in such cases "as a pretext for jurisdiction," and administer the appropriate relief without the "pretext:" *Galland v. Galland*, *supra*.

42. Allegation of Cruelty.—The specific acts which constitute the cruel treatment must be stated: Anonymous, 11 Abbotts' Pr. 231; S. C., *sub nom. Walton v. Walton*, 32 Barb. 203.

43. Common Property.—Where the decree of divorce, for extreme cruelty, in an action in which there was no averment in the pleadings as to the common property, awarded it all to the plaintiff: *Held*, that in so far as it purported to make disposition of or direction concerning such property, it should be reversed, and the cause remanded for amendment of the pleadings and for further proceedings: *Howe v. Howe*, 4 Nev. 469; see Cal. Civ. Code, sec. 146. There is no doubt that the court, in granting a divorce, has authority to direct the defendant to pay the plaintiff alimony, and the allowance may be based upon his earnings, or his ability to earn money: Bishop Mar. and Div., sec. 604.

44. Condonation.—An offer by a wife to return to her husband and live with him, made pursuant to an order of court for her support, in lieu of an allowance, is not a condonation of his previous cruel treatment: *Retz v. Retz*, 19 Abb. Pr. 90.

45. Extreme Cruelty.—Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage: Civil Code, sec. 94: "Grievous"—"afflictive; painful; hard to be borne"—Webster. The question is no longer an open one whether mental suffering, as the result of willful ill treatment, not accompanied with violence to the person, is, or may be such as to justify a divorce on the ground of extreme cruelty. The only question is as to the extent or degree of mental suffering which must be borne without relief, or that will justify relief; whether to be a ground for divorce the mental suffering must have affected the body by injuring the health, or be such, at the least, as to seriously endanger the health. It would be difficult to collate from the authorities, or aside from the authorities to enunciate, any well defined rule that would be applicable in all cases. It is evident that the body is an unreliable indicator of mental suffering. A peculiarly sensitive mind may exist in a body so vigorous as to prevent any material inroad upon the health from mental suffering, no matter how great; whilst in other cases, where the mind is less sensitive the body may be so weak as to yield to comparatively trifling mental suffering. If divorces are granted to prevent or relieve suffering, and not simply to preserve life, it is difficult to assign a satisfactory reason why bodily suffering should be relieved and not the mental. Indeed, in the large majority of cases of personal violence, the wounded pride, the consciousness of lost affection, and the indignity endured, cause keener suffering than the wounded flesh or broken limb. The difficulty, however, lies in the proof. Where the mental suffering has produced no visible effect upon the bodily health or appearance, the tangible standard by which its extent may be measured, whether with accuracy or not, is wanting, and we are left to the recital of suffering by the aggrieved party, and inference as to the probable effect of

the aggressor's treatment. From the very nature of the case the testimony of third persons to the mental sufferings of a complainant can rarely, if ever, present to the court a just conception of it. In the case of *Matthai v. Matthai*, 49 Cal. 93, the district judge, in passing on a motion for new trial, said: "While upon paper it may not appear that plaintiff had any great reason to complain on the score of mental anguish, yet the appearance of the parties in court, in connection with the evidence offered, entirely satisfied my mind that she was a keen sufferer by reason of the premeditated, persistent and willful system of persecution and annoyance adopted by the defendant towards her; * * * that his language to and treatment of her not only caused her mental, but also, physical suffering, and that to remand her to his control and companionship would be virtually consigning her to a premature death or to insanity." In the same case the supreme court say: "The voluminous record sent up is full of the details of the most disgusting and outrageous conduct of the defendant toward the plaintiff; and if the evidence tending to show these is to be believed, it would be a reproach to the law should relief be denied to the plaintiff." The effect of this conduct upon the plaintiff was not discussed by the supreme court.

In *Powelson v. Powelson*, 22 Cal. 358, Cope, C. J., said: "It appears that the defendant was in the habit of using toward the plaintiff the vilest and most abusive language, falsely charging her with adulterous intercourse; that she is a weak, nervous woman, modest in her deportment, and amiable in her disposition; that the conduct of the defendant caused her much mental suffering, producing fits of illness, and threatening permanent injury to her health, rendering a separation from him necessary." In the same case it was further said: "Cruelty, as defined by Bishop, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as naturally interferes with the discharge of marital duties. This definition falls strictly within the doctrine of the cases, and in *Morris v. Morris*, 14 Cal. 76, we adopted it as expressing substantially the meaning of our statute. It seems to be settled that, in order to justify a divorce, the harm to be avoided must be bodily harm, and not merely mental, and some of the authorities go so far as to hold that mental suffering, though affecting the health and endangering the physical safety, is not sufficient. The better opinion, however, is opposed to this view, and we think that any conduct sufficiently aggravated to produce ill-health or bodily pain, though operating primarily upon the mind only, should be regarded as legal cruelty." The definition given by the civil code, above cited, has been since adopted. In Illinois it was held that, although abusive language is not, by itself, cause for divorce, yet where blows are proved, abusive language may be taken into view as determining their character as constituting cruelty, such as warrants a divorce: *Farnham v. Farnham*, 73 Ill. 497; *S. P. Day v. Day*, 56 N. H. 316. A gross abuse of marital rights by the husband, resulting in injury or suffering to the wife, may constitute extreme cruelty within the meaning of the statute of New Jersey, allowing divorces *a mensa et thoro* upon that ground: *English v. English*, 27 N. J. Eq. 579. Where there is no reasonable apprehension of a continuance of cruelty, the divorce will be denied: *Id.* As to cruelty by violence, the kind of violence is not material. In this respect there is no difference between a blow, a push, or any other force: *Dysart v. Dysart*, 1 Robertson, 106, 125; *Saunders v. Saunders*, *Id.* 549, 560. For a

husband to confine his wife; or to starve her; or, having the means to procure them, deprives her of the necessities of life; or withholds medical assistance in sickness, while he is able to provide it; the ill-treatment of his wife's child, if for the purpose of annoying her; desertion; refusing marital connection, have all been held to be cruelty: See Bishop on Marriage and Divorce (5th ed.) vol. 1, sec. 735 *et seq.*, and cases cited. As to the amount of cruelty, or the extent of danger, see *Barrere v. Barrere*, 4 Johns. Ch. 187; *Mason v. Mason*, 1 Edw. Ch. 278; *Richards v. Richards*, 1 Grant (Pa.) 489; *Mahone v. Mahone*, 19 Cal. 626, 628; *Graecen v. Graecen*, 1 Green Ch. 459. A bill for divorce which, in stating a case for divorce on the ground of adultery, avers the contracting by defendant of a venereal disease, will authorize a decree on the ground of extreme cruelty, where the proof clearly substantiates the fact so averred: *Canfield v. Canfield*, 34 Mich. 519; *Collett v. Collett*, 1 Curt. Ec. 678; *Long v. Long*, 2 Hawks, 189. In Iowa, the cruel treatment must be such as to endanger life, and the complaint must state the specific acts of inhuman treatment: *Freerking v. Freerking*, 19 Iowa, 33. Where a husband, in presence of his wife, in spite of her entreaties, unmercifully beats her child, it is cruel and inhuman treatment: *Bihin v. Bihin*, 17 Abb. Pr. 19. But demeanor calculated to provoke annoyance, discontent and disgust, is not sufficient: *Conklin v. Conklin*, 17 Abb. Pr. 20, note. And divorces are granted in such cases to relieve from apprehended danger of bodily harm: *Morris v. Morris*, 14 Cal. 76. But not when such cruelty is caused by the misconduct of the wife: *Johnson v. Johnson*, 14 Cal. 459. The acts or character of treatment which will amount to extreme cruelty, sufficient to constitute a ground of divorce, must in a great measure depend on the character of the respective parties and the peculiar circumstances of each case: *Reed v. Reed*, 4 Nev. Rep. 295.

46. Form, with Claim for Alimony.—That plaintiff and defendant were duly married and became husband and wife in the kingdom of Prussia, in the year 1859, and immediately removed to the state of California, from which time they continued to live and cohabit together as man and wife, in this state, till November, 1864, during which time they had born unto them one child, a son (now under plaintiff's care), and by their united exertions acquired property of the value of twenty thousand dollars, which property consists of money, stocks, notes and other personal securities, now entirely in the hands and under the control of defendant; that in the month of November, 1864, defendant, without cause or provocation, drove plaintiff from his house, and ever since has and still does refuse to live or cohabit with plaintiff, allow her to return to his house or to speak to him; and since the separation as aforesaid, the defendant has supplied her with seventy-seven dollars per month for the maintenance of herself and child, but threatens to reduce or wholly deprive her of this allowance at his pleasure; that she has no separate property. Wherefore plaintiff prays permanent alimony in the sum of..... dollars per month, to be paid and secured to her for the separate maintenance of herself and child, and that the custody of said child be awarded to her. This was substantially the form of complaint in *Galland v. Galland*, 38 Cal. 265.

47. Provocation of Violence.—A divorce will not be granted on the ground of extreme cruelty, where it appears that the complaining party has willfully provoked the violence or misconduct complained of, unless such violence greatly exceeds the provocation: *Reed v. Reed*, 4 Nev. 395. Where

the conduct of the plaintiff was not free from fault, but it was not of such a character as to excuse defendant's acts of personal violence, the court is authorized to grant a divorce: *Eidenmuller v. Eidenmuller*, 37 Cal. 364.

48. Single Act of Violence.—A mere act of violence, where there is no apprehension of its repetition, and which is the result of rashness rather than malignity, does not furnish a ground of divorce on the ground of extreme cruelty, because this relief is not granted to punish the party guilty of misconduct, but to relieve the other party from future suffering or violence: *Reed v. Reed*, 4 Nev. Rep. 395.

No. 499.

v. *On the Ground of Willful Neglect, Having the Ability to Provide.*
[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in Form No. 495.]

II. [Allege residence as in Form No. 495.]

III. That the defendant for more than one year last past, has willfully neglected to provide for plaintiff the common necessities of life, having the ability so to do, and has compelled plaintiff to live upon the charity of friends, notwithstanding he is abundantly able to support her, and is worth, as this plaintiff is informed and believes, about the sum of dollars, and is in the constant receipt of wages sufficient for their joint support from his daily labor, to wit, about dollars per month.

[Demand of Judgment.]

49. Code.—Willful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation: Civil Code sec. 105. Willful neglect must continue for one year before it becomes a ground for divorce: Id. sec. 107. The only limitation to this action is "an unreasonable lapse of time before the commencement of the action:" Id. 124.

50. Charge of Failure to Support.—It must affirmatively appear in the complaint, that the husband was the owner of property sufficient to provide for the necessities of life, and neglected so to do, where the application is made on the ground of the willful neglect of the husband, for the statutory period to provide the common necessities of life, having the ability to provide the same: *Washburne v. Washburne*, 9 Cal. 476. The residence of the husband with the wife within the three years (now one year) is no answer to the application where it appears they were not living together at the commencement of the suit: Id. If those common necessities are provided by the earnings of either, there is no such willful neglect as is contemplated by the statute: Id. The earnings of both husband and wife go into a common fund, and become common property, the disposition of which belongs to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree: Id.

51. Complaint.—A complaint which merely charges the defendant with “willful neglect” does not state a cause of action, because, by the statute, there are two sets of facts which are included within the expression “willful neglect:” First. A neglect on the part of the husband to provide the wife with the common necessities of life, he having the ability to do so; and, Second. His failure to do so when he is unable, provided such inability has been caused by his idleness, profligacy or dissipation: *Devoe v. Devoe*, 51 Cal. 544. A complaint averring willful neglect, in that by reason of profligacy and dissipation the defendant has failed to provide, etc., will not support a finding that the defendant failed to provide, having the ability to do so: *Id.*

No. 500.

vi. *Willful Neglect—Failure by Reason of Idleness, etc.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 495.]

II. [Allege residence as in form No. 495.]

III. That the defendant for more than one year last past has failed to provide for the plaintiff the common necessities of life because of his idleness, profligacy and dissipation.

[Demand of Judgment.]

NOTE.—If the failure to provide is attributable clearly to one of these causes, it is sufficient to allege that one, and omit the others. If all are inserted, it must be in the conjunctive.

No. 501.

vii. *On the Ground of Habitual Drunkenness.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 495.]

II. [Allege residence as in form No. 495.]

III. That the defendant disregarding his duties as a husband towards the plaintiff, has been guilty of habitual intemperance for more than one year last past.

[Demand of Judgment.]

52. Habitual Intemperance Defined.—Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party: Cal. Civil Code, sec. 106. Before the adoption of this section it was said: If there be a habit of drinking to excess, to such a degree as to disqualify the party from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance: *Mahone v. Mahone*, 19 Cal. 626. One who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the

temptation is presented by his being in the vicinity where liquors are sold, is an habitual drunkard within the meaning of the Michigan divorce law: *Magahay v. Magahay*, 35 Mich. 210. By Kentucky Rev. Statute, 390, a decree of divorce in favor of a wife may be had for the following cause: "Confirmed habit of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for his wife and children:" *Held*, that the words "wasting of his estate," where the husband has no property, apply to and embrace his health, time, and labor, all of which, for the purpose of supporting himself and family, are essentially his estate: *McKay v. McKay*, 18 B. Mon. (Ky.) 8. A single act of drunkenness and indecency of the wife is not such an indignity as will render the condition of the husband intolerable, within the meaning of the statute of Missouri: *Kempf v. Kempf*, 34 Mo. 211. Habitual drunkenness, a series of annoyances, and extraordinary conduct, do not constitute legal cruelty, but in addition to these, the willful communication of a venereal disease to the wife is cruelty: *Brown v. Brown*, Law Rep. 1 P. & D. 46; *Boardman v. Boardman*, Id. 237.

ANNULMENT OF MARRIAGE.

A marriage may be annulled for any of the following causes existing at the time of the marriage:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

3. That either party was of unsound mind, unless such party after coming to reason freely cohabit with the other as husband or wife.

4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterward freely cohabited with the other as husband or wife.

6. That either party was, at the time of the marriage, physically incapable of entering into the married state, and such incapacity continues and appears to be incurable: Cal. Civ. Code, sec. 82.

53. Action, by whom Brought, and when.—1. For causes mentioned in subdivision one: By the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of consent; 2. For causes mentioned in subdivision two: By either party during the life of the other, or by such former husband or wife; 3. For causes mentioned in subdivision three: By the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party; 4. For causes mentioned in subdivision four: By the party injured, within four years after the discovery of the facts constituting the fraud; 5. For causes mentioned in subdivision five: By the injured party within four years after the marriage; 6. For causes mentioned in subdivision six: By the injured party within four years after the marriage.

54. Children of Annulled Marriage.—Where a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents: Cal. Civ. Code, sec. 84.

55. Custody of Children.—The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party: Cal. Civil Code, sec. 85.

56. Effect of Judgment of Nullity.—A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them: Cal. Civil Code, sec. 86.

57. Place.—It is well settled that a marriage which is valid under the law of the place where celebrated is valid everywhere. It would follow that a marriage in another State, which, if solemnized in California, would be voidable, could not be annulled in the latter State, unless it was voidable in the State where it was solemnized for a reason recognized by the California Code. In *Medway v. Needham*, 16 Mass. 157, it was *held*, that a marriage which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage will nevertheless be valid in the country where the parties live; but this principle will not extend to legalize incestuous marriages so contracted: see, also, *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v. Lexington*, 1 Id. 505; *True v. Ranney*, 21 N. H. 52. An action to annul a marriage goes to the inception of the relation, the marriage itself; while an action for divorce, strictly speaking, is for causes subsequent to the marriage, and in relation to which a different, though not uniform rule, prevails.

No. 502.

viii. *To Annul a Marriage on the Ground of Fraud.*

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [Allege marriage and residence as before.]

III. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudu-

lently represented that she was chaste and virtuous, and was physically competent to marry the plaintiff, and concealed from the plaintiff her real physical condition.

IV. That the defendant was not then and there chaste and virtuous, and was not at the time physically competent to marry the plaintiff, but was at the time of the said marriage in a state of pregnancy by some other man than the plaintiff.

V. That the plaintiff was induced to consent to the said marriage by the said representations, which he believed at the time of his said marriage to be true, and that if the said representations had not been made to him, and said concealment had not been practiced, he would never have consented to the said marriage.

VI. That immediately upon his discovery of the falsehood of said representations, to wit, on the day of, 187., the plaintiff ceased to cohabit with the defendant, and has never since cohabited with her. Wherefore the plaintiff prays that said marriage may be annulled, and that he be forever released and discharged from any and all obligations and duties arising from said marriage, and for other proper relief.

58. Ante-Nuptial Unchastity.—While neither party to a contract to marry is bound by a promise made in ignorance by the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein (Cal. Civil Code, sec. 62), yet ante-nuptial unchastity is not, as a rule, ground for annulling a marriage. In an extreme case, as where a man married a common prostitute without knowledge of her character, there seems to be doubt: See Bishop on Marriage and Divorce, vol. I, sec. 179 *et seq.* Cases where there was actual pregnancy, by a stranger, at the time of the marriage, authorize an annulment. In *Baker v. Baker*, 13 Cal. 87, the Court said: "It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the contract. Its concealment operated as a fraud upon the plaintiff of the gravest character. His contract was with her and for her; it referred to no other person, much less included a child of bastard blood. A child imposes burdens and possesses rights. It would necessarily become a charge upon the defendant, and through her upon the plaintiff. It would become a presumptive heir of his estate. * * A woman, to be marriageable must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract." See, also, *Leavitt v. Leavitt*, 13 Mich. 452, 458, and *Dawson v. Dawson*, 18 Id. 335. It is not necessary to prove express representations on her part that she was chaste: *Donovan v. Donovan*, 9 Allen (Mass.), 140.

59. Alimony.—In an action by a man, to obtain a decree declaring void a marriage, for the reason that the defendant at the time of such marriage had a living husband, the fact being admitted, the Court will not grant the defendant alimony and a counsel fee; because she is admittedly not the wife of plaintiff: *Appleton v. Warner*, 51 Barb. 270.

60. Frauds which Invalidate.—Those frauds which invalidate a marriage are usually such as negative any consent to be married at all, and are commonly duress, surprise, or stratagem in procuring the marriage, and the fraud must be nearly if not actually coincident with the marriage: *Leavitt v. Leavitt*, 13 Mich. 452. So of a marriage procured by abduction, terror, or fraud: *Ferlat v. Gojon*, Hopk. 478. Or by fraud and force: *Sloan v. Kane*, 10 How. Pr. 66. Where the husband had, before marriage to his present wife, represented to her that his former wife was dead, when in fact she was living, he having been divorced from her, these representations, even if fraudulent, are not fraud in a material matter or thing, within the legitimate purposes of marriage: *Clarke v. Clarke*, 11 Abb. Pr. 228.

No. 503.

ix. To Annul Marriage on the Ground of Non-Age.

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [as in form No. 495.]

III. That at the time of her said marriage she was residing with her parents, A. B. and D. B., at; that at the time of her said marriage she was under the age of fifteen years, to wit: of the age of fourteen years and one month, and that she arrived at the age of fifteen years on the day of, 187.. And she avers that her said marriage was contracted and consummated without the consent [and against the will] of her said parents, and that she has not, since she attained the age of fifteen years, cohabited with the said defendant.

[Demand of Judgment Annuling, etc.]

No. 504.

x. Same—By Parent.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is the daughter of this plaintiff; that she is a minor under the age of fifteen years, to wit: of the age of, and has always, until the time of her marriage hereinafter stated, resided with, and been under the care, custody and control of this plaintiff.

II. That on the day of, 187., at, she, the said A. B., intermarried with the defendant, D. B.

III. That the parents of the said A. B. did not, nor did either of them, consent to her said marriage to the defendant.

[*Demand of Judgment Annuling, etc.*]

61. Minors—Age of Consent.—Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years and upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage: Cal. Civ. Code, sec. 56. Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases: Id. sec. 57.

No. 505.

xi. Former Husband or Wife Living.

[TITLE.]

The plaintiff complains, and alleges:

I. That she is now, and for more than last past, has been a *bona fide* resident of the State of California, and now resides at, in said State.

II. That on the day of, 187., she was married to the defendant at, in said State.

III. That at the time of said marriage the said defendant had a former wife living, and that the defendant's marriage with said former wife was then, to wit., at the time of plaintiff's said marriage to the defendant, in force, and undissolved by decree of divorce or otherwise.

[*Demand of Judgment Annuling, etc.*]

62. Absence of Former Husband.—Where, after a husband has been absent five years, and not heard from, and the wife in good faith, supposing him dead, marries another, the marriage is voidable only, and cannot be adjudged void at the instance of a third party: *Crosbey v. McKinney*, 30 Barb. 47; see *Griffin v. Banks*, 24 How. Pr. 213.

No. 506.

xii. On the Ground of Lunacy.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in Form No. 495.]

II. [Allege residence as in Form No. 495.]

III. That at the time of such marriage he [she] was a lunatic, and incapable of contracting a marriage, and has been ever since [or state the duration].

IV. That the defendant is now perfectly recovered of his [her] lunacy aforesaid, and restored to his [her] right mind,

memory, and understanding, and has been for about months last past, and that since his [her] restoration to a sound state of mind as aforesaid, the plaintiff has not cohabited with the said defendant.

[*Demand of Judgment.*]

63. Return to Reason.—Where a person, insane at the time of her marriage, after return to reason refused to ratify or consummate it, and filed her bill to annul it, the court decreed the marriage null and void: *Wightman v. Wightman*, 4 Johns. Ch. 343.

No. 507.

xiii. *On the Ground of Physical Incapacity.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 495.]

II. [Allege residence as in form No. 495.]

III. That immediately after said marriage took place, the plaintiff discovered that the said defendant A. B., at the time of her [his] marriage with the plaintiff, as aforesaid, was physically incapable of entering into the marriage state; that the [etc., stating the cause of such incapacity.]

IV. That the physical incapacity of the said A. B., arising from her diseased condition, as aforesaid, was well known to the defendant at the time of her [his] intermarriage with the plaintiff, as aforesaid, but was wholly unknown to the plaintiff.

V. That the plaintiff has been informed and believes that the said physical incapacity of the said A. B. still exists, and is incurable, and so charges the fact to be.

Wherefore the plaintiff demands judgment, that the marriage between him [her] and the said defendant may be dissolved and annulled, according to the statute in such case made and provided.

64. Impotence.—To authorize a sentence of nullity on the ground of impotence, the existence of incapacity at the time of marriage, its continuance and that it is incurable, must be shown: 1 Chitt. M. J. 375; Law. of H. & W. 16; 1 Hagg. Ecc. 523; 2 Lees. Ecc. Cas. 580; 1 Beck's M. J. 68; 4 Partida, tit. 8; Van Leeuw. 87; *Davenbagh v. Davenbagh*, 5 Paige 554; *Bascomb v. Bascomb*, 25 N. H. 267; *Keith v. Keith*, Wright (Ohio), 518; but see *Burtis v. Burtis*, Hopk. (N. Y.) 557.

65. Medical Examination.—The court has power to compel the defendant to submit to a medical examination, though the statute makes no provision for it: *Le Barron v. Le Barron*, 35 Vermt. 365. Whether in such case the court has power to compel the defendant to answer interrogatories on oath, *quere*: Id.

66. Void Marriage.—Though a marriage be void, *ab initio*, as for insanity, lineal consanguinity, etc., there ought to be a judicial decision to that effect: *Wightman v. Wightman*, 4 Johns. Ch. 343; see *Rawdon v. Rawdon*, 28 Ala. 565. “Either party to an incestuous or void marriage may proceed by action in the district court to have the same so declared:” Cal. Civil Code, sec. 80.

No. 508.

xiv. To Declare Marriage Void.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege residence as in form No. 495.]

II. That on the day of, 187 , at San Francisco, in this State, a marriage between the plaintiff and defendant was duly solemnized by A. B., who was then and there a Justice of the Peace, duly authorized by the laws of this State to solemnize marriages, and the certificate of such solemnization has been duly recorded as required by law.

III. That plaintiff is a white person and the said defendant is a mulatto [or allege any cause which, under the statute, makes the marriage void].

Wherefore the plaintiff prays that said marriage may be, by the decree of this Court, declared to be void for the reason aforesaid, and for other proper relief.

CHAPTER IV.

FRAUD.

No. 509.

i. For Rescission of Contract, on the Ground of Fraud.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the....day of....., 187., the plaintiff was the owner of a farm situated in the town of....., County of.....[describing it].

II. That the plaintiff then was and ever since has been old, infirm, and blind, and wholly incapacitated from attending to business, and the defendants on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form.

III. That on the....day of....., 187., the plaintiff demanded possession of said writing of the defendants, or information as to the contents thereof, but the defendants refused to surrender the same, or to give him any information concerning the same.

IV. That the plaintiff is informed and believes that the said writing is under seal, and is a deed of said premises, and conveys the same or some interest therein to the defendants; and they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Wherefore the plaintiff demands judgment:

1. That the said writing is void.
2. That the defendants produce the said writing, and deliver it up to be canceled.
3. For costs of this action.

NOTE.—This form is in substance from Abbott's Forms.

1. Act of Agent.—Fraud committed through an agent is well stated in pleading as that of the principal. If this were otherwise, and it appeared at the trial to be that of an agent without any participation of his principal, the variance is the subject of amendment, and will be disregarded upon appeal: *Bennett v. Judson*, 21 N. Y. 238. Equity will relieve, where falsehood or fraud is practiced, whether it be by the principal or the agent: *Mason v. Crosby*, 1 Woodb. & M. 342; *Smith v. Babcock*, 2 Id. 246, 293. Even when the false representations are made to a third person and by him communicated to the purchaser, it is deemed as if made by the seller: *Crocker v. Lewis*, 3 Sumn. 1. In case of fraudulent representations by a stranger, the relief granted must be on the ground of mistake: *Fisher v. Boody*, 1 Curt. C. Ct. 206. It is a fraud for an agent to avail himself of his confidential relations to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust even when the agency must be proved only by parol: 1 Russ & Mylne, 53; 11 Bligh, 397, 418; *Jenkins v. Eldridge*, 3 Story C. Ct. 18; but see 1 Eden, 515; S. C. 1 Cox, 15; 4 Russ. 423. In alleging fraud committed by an agent, it is the better practice to state the fact that the defendant acted by an agent: See, also, 2 Chit. Pl. 117; 1 Wentw. 345.

2. Act of Legislature—Fraud.—An act of the legislature is not subject to attack on the ground of fraud, and it is sufficient on this point to refer to *Sherman v. Story*, 30 Cal. 266; *Oroville and Virginia City Railroad Company v. The Supervisors of Plumas County*, 37 Cal. 354. Any attempts to deceive persons entrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public: *Marshall v. Baltimore and Ohio R. R. Co.*, 16 How. U. S. 334. All persons interested in the passage of an act have an undoubted right, either in person, or by counsel, to urge their claims and arguments, before legislative committees, as well as in courts of justice; but a hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature: See *Miles v. Thorne*, 38 Cal. 335.

3. Act of Attorney.—If a sale of lands under a power of attorney procured through fraud be set aside as fraudulent and void *ab initio*, the fraudulent vendee is not entitled to a decree against the vendor for restitution of a part of the purchase money paid to the attorney who was privy to the fraud: *Sanchez v. McMahon*, 35 Cal. 218.

4. Actual Fraud.—Actual fraud consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; 5. Any other act fitted to deceive: Cal. Civ. Code, sec. 1572. Actual fraud is always a question of fact: *Id.*, sec. 1574. Where a bill charges actual and intentional fraud, and prays for relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which may amount to a case for relief, under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the charge of actual fraud: *Eyre v. Potter*, 15 How. U. S. 42. Rule is applied to purchase from widow by her stepson. If a bill charges fraud as the ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient, under some circumstances, to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed: *Fisher v. Boody*, 1 Curtis C. Ct. 206. An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal: Cal. Civ. Code, sec. 2306.

5. Apparent Consent to Contract.—An apparent consent (to a contract) is not real or free when obtained through duress, menace, fraud, undue influence, or mistake: Cal. Civil Code, sec. 1567. Consent is deemed to have been obtained through one of the causes mentioned in the last section, only when it would not have been given had such cause not existed: *Id.*, sec. 1568.

6. Assignment.—A cause of action for damages for procuring a sale of goods by false representations is assignable; and the assignee may sue thereon without joining the assignor: *Johnson v. Bennett*, 5 Abb. Pr. (N. S.) 331; *Allen v. Brown*, 51 Barb. 86.

7. Belief—Means of Knowledge.—In an action for fraudulent misrepresentations, if it appears that the defendant had information and knowledge of facts which, in the exercise of common sense and ordinary prudence, were sufficient to put him on inquiry and lead him to a knowledge of the truth, he will be liable the same as if he had actual knowledge. In such case he had not an honest belief in the truth of the false statement: *Morehouse v. Yeager*, 41 N. Y. Superior Ct. 135. As to duty of buyer to make inquiry if he suspects the truth of the seller's representations, see *Burr v. Wilson*, 22 Minn. 206.

8. By Bidding.—The employment of any person by a seller to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of such seller to enforce his

bid, is a fraud upon the buyer, which entitles him to rescind his purchase: Cal. Civil Code, sec. 1797.

9. Consideration.—Mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud or mistake: *Eyre v. Potter*, 15 How. U. S. 42; *Wright v. Stanard*, 2 Brock. Marsh. 311; this subject considered in *Vint v. King*, 2 Am. Law. Reg. 712. The inserting in the deed of a consideration less than the true consideration is not of itself a fraud, if a fair amount was paid: *Ex parte Knowles*, 2 Cranch C. Ct. 576. But an entire failure of consideration is often sufficient to rescind a contract in equity, although mere inadequacy of consideration is not: 2 Ves. 155; 1 Met. 180; 1 Story Eq. Jur. 244; 1 Knapp P. C. 73; 1 Brown Ch. Ct. App. 558; 1 Cox, 383; 8 Ves. 133; *Warner v. Daniels*, 1 Wood. & M. 90. Where purchaser does not receive the title which the deed purports to convey, and he goes into and retains possession under the deed, and the failure of title goes to the entire consideration paid, the remedy is by a rescission of the contract, alleging a paramount title in another, and offering to re-deliver possession and account for the rents and profits: *Walker v. Sedgwick*, 8 Cal. 398. A creditor who attacks a sale on the ground of fraud as to him, admits the validity of the sale between the parties thereto, but seeks the benefit of the statute as to himself, and must show fraud: *Thornton v. Hook*, 36 Cal. 223.

10. Contract of Agent.—An action *ex-contractu* does not lie against one who fraudulently represents himself as the agent of another, and makes a contract in his name. The remedy is an action for deceit: *Noyes v. Loring*, 55 Me. 408.

11. Contract of Sale.—A party who sues to rescind a contract for the purchase of land, on the ground of fraud, must in his bill offer to return the land purchased: *Murphy v. McVicker*, 4 McLean, 252.

12. Contract to Exempt from Liability for.—All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law: Cal. Civ. Code, sec. 1668.

13. Contract not in Writing through Fraud.—Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party: Cal. Civil Code, sec. 1623.

14. Constructive Fraud.—Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud: Cal. Civil Code, sec. 1573.

15. Conveyance by Corporation.—If the persons interested in one corporation form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock in the old corporation receive in exchange therefor stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation: *S. F. & N. P. R. R. Co. v. Bee*, 48 Cal. 398.

16. Damages.—A recovery cannot be had for a false representation without proof of damage: *Morrison v. Lods*, 39 Cal. 381; *Marshall v. Buchanan*, 35 Id. 264; *Freeman v. Venner*, 120 Mass. 424.

17. Damages, Exemplary.—Exemplary damages may be given in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed: Cal. Civil Code, sec. 3294.

18. Debts Fraudulently Contracted.—In case of a debt fraudulently contracted by a partnership firm by one member alone, made with innocent third parties, while all the members will be bound in an action brought on the contract, or to recover the property so fraudulently obtained, yet the liability to an action for the fraud, which is essentially different, and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud or ratified it, or retained its fruits with knowledge of the fraud: *Stewart v. Levy*, 36 Cal. 159.

19. Deceit, how Alleged.—In alleging deceit, the averment that the defendant falsely and fraudulently represented, etc., is sufficient, as an allegation of his knowledge, that his representations were false. But if this were not the case, an objection to a pleading for such defect, if not taken at the trial, cannot be raised on appeal from the judgment: *Thomas v. Bebee*, 25 N. Y. 244.

20. Deed Deposited with Third Person.—Where a bill in equity is filed to cancel a deed which avers that the grantor deposited the same with a third person, to be by him delivered to the grantee upon the order of the grantor or his agent, and that before the agent gave the order the grantor directed the third person not to deliver the deed, but does not aver that the third person intends or threatens to deliver the deed to the grantee, or that he will disobey the instructions of the grantor, the bill does not state facts sufficient to constitute a cause of action: *Fitch v. Bunch*, 30 Cal. 208. If a suit to rescind a deed is brought after a considerable lapse of time, and after the plaintiff has exercised the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof: *Fisher v. Boody*, 1 Curtis C. Ct. 206. For a complaint to set aside a deed of a minor, on his coming of age, see *Voorhies v. Voorhies*, 24 Barb. 150.

21. Demand.—A demand for the price of goods sold is not necessary to maintain an action against a debtor for fraudulently purchasing the same. Payment, though it would satisfy the debt, would not remove the fraud which is the gravamen of the action: *Stewart v. Levy*, 36 Cal. 159.

22. Equity—Injunction.—The party who comes into a court of equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor, cannot obtain relief if his purchase is tainted with fraud: *S. F. & N. P. R. R. Co. v. Bee*, 48 Cal. 398.

23. Evidence.—Other acts of fraud are admissible to corroborate the evidence of the fraud for which the suit is brought, whenever the two are shown to have been parts of one scheme or plan: *Berkey v. Judd*, 22 Minn. 287; *S. P. Waters' Patent Heater Co. v. Smith*, 120 Mass. 444; *Eastman v. Fresno*, 49 Vt. 355. The delivery of a deed in blank, by which to obtain money of one

not informed of the fact that it is in blank, affords strong evidence of fraud: *Wilson v. South Park Comrs.* 70, Ill. 46.

24. Facts Must be Alleged.—A bill for relief upon the ground of fraud must be specific in stating the facts which constitute the fraud. It is not sufficient to charge fraud in general terms: *Kent v. Snyder*, 30 Cal. 666; *Castle v. Bader*, 23 Id. 75; *Moore v. Greene*, 19 How. U. S. 69; *Beaubien v. Beaubien*, 23 Id. 190. And without the averment of such facts, the expressions "fraudulently," "deceitfully," "by mistake," will not bring the case within the equitable jurisdiction, even on a demurrer to the bill: *Magniac v. Thomson*, 2 Wall. jr. C. Ct. 209; S. C., 15 How. U. S. 281. In imputing fraud, the term itself need not be used, if the facts stated amount to it: *Attorney-general v. Corporation of Poole*, 4 Myl. & C. (18 Eng. Ch.) 17; S. C., 8 L. J. (N. S.) Ch. 27. No allegation of fraud is necessary in the complaint in an action founded on a warranty deed. Any allegations of fraud in such complaint, when not essential, may be disregarded: *Quintard v. Newton*, 5 Rob. 72. In case of a warranty, the *scienter* need not be alleged: *Holman v. Dord*, 12 Barb. 336. But the fraud or deceit must be substantially alleged: *Everston v. Miles*, 6 Johns. 138; *Zabriskie v. Smith*, 3 Kern. 322; *Cazeaux v. Mali*, 25 Barb. 578.

25. False Representations.—The essential allegations in an action to recover damages for false and fraudulent representations, are: First, That they were false; Second, That defendant knew them to be false; Third, That he made them with intent to defraud the plaintiff. These facts should be clearly stated: *Sharp v. Mayor of N. Y.*, 25 How. Pr. 389; *Addington v. Allen*, 11 Wend. 374; reversing S. C., 7 Id. 9; *Wells v. Jewett*, 11 How. Pr. 242. In an action on the case for fraud in the sale of a lot of land, a declaration sufficiently alleges the fraud which states that the defendant induced the plaintiff to purchase by fraudulently misrepresenting, in the course of a conversation between the plaintiff and the defendant in regard to the sale of the land, "that there were three thousand spruce logs on the premises (meaning that there were spruce trees growing thereon that would cut and make three thousand spruce logs of the usual and customary size and quality), which the plaintiff believed and bought the premises; and that the representations were false, and known to be so by the defendant:" *Whitton v. Goddard*, 36 Vermt. 730. Where a complaint averred a fraudulent agreement, and alleged that the representations to the plaintiffs, and the purchase made of the plaintiffs on such representation, were made in pursuance of such fraudulent agreement, and were a device and contrivance, the complaint was held sufficient after verdict: *Ballard v. Lockwood*, 1 Daly, 158, see note, *ante*.

26. Fraud Defined.—Any material misrepresentation of a material fact as to which one party places a known trust and confidence in the other, and by which the confiding party is actually misled to his injury, will induce a court of chancery to set aside a conveyance: *Smith v. Richards*, 13 Pet. 26. Fraud in the use of a written instrument is as much ground for the interposition of equity as fraud in its creation: *Pierce v. Robinson*, 13 Cal. 116.

27. Fraud—When Consummated.—The fraudulent intent of a party to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of the sale: *Stewart v. Levy*, 36 Cal. 159.

28. Fraud must be Alleged.—The burden of charging, as well as of proving fraud, is on the party alleging it. Mere conclusions will not avail: *Butler v. Viele*, 44 Barb. 166. A general allegation that the grantee procured the deed by false and fraudulent representations and practices, and by undue and improper influence, is insufficient, without stating the nature of the alleged representations: *Id.* Where upon the facts the law adjudges fraud, still it is not therefore indispensable that the complaint should in terms allege fraud, and its omission does not substantially vary the cause of action: *Sharp v. Mayor of N.Y.* 40 Barb. 256.

29. Fraudulent Deed.—C. fraudulently obtained a deed of D., conveying land in Michigan, and had said deed recorded in said state. C. then granted said lands to third parties: *Held*, that even under this fraud courts of another state could not undertake to pronounce these recorded deeds nullities. But the parties being before the court, and there being no attempt to prove that the last-mentioned grantees were purchasers for a valuable consideration, the court could compel said grantees to execute to D. a release of all claim acquired through the deed from him, under penalty for attachment of contempt. If said grantees should go beyond the jurisdiction, the court should appoint a special commissioner to make the conveyance in their stead: *Cooley v. Scarlett*, 38 Ill. 316. In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance is not irrelevant or redundant matter: *Perkins v. Center*, 35 Cal. 713.

30. Fraudulent Intent.—That fraudulent intent should be averred in pleading a charge of fraud, see *Moss v. Riddle*, 5 Cranch, 351; compare *Fenwick v. Grimes*, 5 Cranch, C. Ct. 439. When the facts relied upon as constituting the fraud must be pleaded, see *McClintick v. Johnson*, 1 McLean, 414; *Lathrop v. Stewart*, 6 Id. 630. A party seeking relief from the payment of purchase-money, on the ground of fraud, must distinctly allege it in the bill: *Noonan v. Lee*, 2 Black, U. S. 499.

31. Fraudulent Note.—When a party has given a promissory note, and the payee assigns the note, without recourse, after maturity, and suit is brought upon the note by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: *Held*, that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation: *Domingo v. Getman*, 9 Cal. 97. For a form of complaint to cancel a note or bill in defendant's possession, see *Gardner v. Lee's Bk.*, 11 Barb. 558. For a complaint seeking to avoid payments of notes given by a company never duly organized, see *Jones v. Dana*, 24 Barb. 395.

32. Fraudulent Representations.—A complaint alleged that the plaintiff was the keeper of a livery stable, and as such it was his business to keep horses for hire, etc.; that he kept in his stable two valuable horses of his own, etc.; that the defendant, knowing these facts, brought to the plaintiff a horse which had the distemper, representing that the horse had recovered and could not communicate the disease; that the plaintiff being ignorant of the condition of the horse received him into his stable, relying on the defendant's representations; that the defendant knew that the disease was then in the contagious stage, and that the plaintiff's two horses took the disease:

Held, that the complaint was not bad for not alleging that the injury occurred without fault or negligence on the part of the plaintiff, or that the plaintiff did not in his business receive sick and diseased horses for keeping: *Fultz v. Wycoff*, 25 Ind. 321.

33. Fraudulent Sale.—If a debtor makes a sale of his personal property to one of his creditors, with the understanding that out of the proceeds of a sale of the property, the creditor shall retain enough to pay his own debt, and then pay certain other creditors, and then pay the balance of the proceeds over to the debtor, and this sale is made to prevent other creditors from attaching the property, it is actual fraud, and vitiates the sale as to other creditors: *Menton v. Adams*, 49 Cal. 620. As to when the *bona fides* of a sale can be inquired into, see *Quinn v. Smith*, Id. 163. As to change of possession, and circumstances of fraud, see *Regli v. McClure*, 47 Id. 612.

34. Fraudulent Sale of Mine.—If a complaint avers that the defendant, by false representation as to the value of mines, induced the plaintiff to purchase the same, and pay a sum of money therefor, and that defendant gave plaintiff a deed therefor, and received the consideration, and also claims general damages exceeding the consideration, and avers an offer to return the deed, it is an action, in common law parlance, *ex delicto*, and not *ex contractu*, and the averment of an offer to return the deed is not an offer of a rescission of the contract, nor an offer to rescind: *Ahrens v. Adler*, 33 Cal. 608. If the plaintiff in his complaint claims damages for a fraudulent sale of mines to him, and avers an offer to return the deed given to him, an amendment striking out the offer to return the deed does not change the issues tendered in the complaint: Id. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value. Plaintiff sold his interest in this claim to defendant for greatly less than its value: *Held*, that in a suit by plaintiff against defendant, to set aside this sale for fraud, and for an account, etc., an averment that defendant is indebted to plaintiff on an account in a sum greater than that paid by defendant for the mining, is in effect an offer to place defendant in *statu quo*: *Watts v. White*, 13 Cal. 321.

35. Guardian's Sale.—For complaints to set aside guardian's sale as fraudulent, see *Clark v. Underwood*, 17 Barb. 202.

36. Insufficient Averments.—Where the complaint alleges "that by virtue of the covenants of said deed, said B. M. covenanted and agreed that she had title to said premises, and the right to convey the same, and that she had not prior thereto conveyed the same to any person except to said plaintiff and W.," and that relying solely upon the said representations "made by B. M., that she was the owner of the premises, they accepted and received the deed in part payment of a pre-existing debt," and that "by means of which false and deceptive representations" they have suffered damages in the sum of, etc., it was held ambiguous and uncertain: *Lawrence v. Montgomery*, 37 Cal. 183.

37. Indentures of Apprenticeship may be annulled for fraud in the contract of indenture: Cal. Civ. Code, sec. 276.

38. Instrument made with Intent, etc.—Every instrument, other than a will, affecting an estate in real property, including a charge upon real prop-

erty, or upon its rents and profits, made with intent to defraud prior or subsequent purchasers thereof, or incumbrances thereon, is void as against every purchaser or incumbrancer, for value of the same property, or the rents and profits thereof: Cal. Civil Code, sec. 1227. But is not void against purchaser or incumbrancer having notice, unless the fraud is mutual: See *Id.*, sec. 1228.

39. Intent.—In all cases arising under section 1227 (relating to unlawful transfers), except as provided in sec. 3440 (which declares that certain transfers are presumed fraudulent), the question of fraudulent intent is one of fact and not of law: Cal. Civil Code, sec. 3242; see, also, *Tully v. Harloe*, 35 Cal. 302. A mortgage knowingly given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor: *Id.*

40. Involuntary Trust resulting from Fraud.—One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he had some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it: Cal. Civil Code, sec. 2224.

41. Jurisdiction.—Courts of law and equity have concurrent jurisdiction of fraud in many cases: *Swayze v. Burke*, 12 Pet. 11; *Rhoades v. Selin*, 4 Wash. C. Ct. 715; *Seabury v. Field*, 1 McAll. 60; *e. g.*, to enforce a bond cancelled by the obligee in consequence of fraud practised by the obligor: *United States v. Spaulding*, 2 Mas. 478. On account of the difficulties in adjusting the rights and equities of the parties at law, a court of law refuses to open the question of fraud, in the consideration, or in the transaction out of which the consideration arises, in a suit upon a sealed instrument: *Hartshorn v. Day*, 19 How. U. S. 211; overruling *Day v. New Eng. Car Spring Co.*, 3 Liv. Law. Mag. 44. Fraud is a well-recognized ground of equitable jurisdiction: *Atkins v. Dick*, 14 Pet. 114. In both equity and law, fraud and injury must concur to furnish ground for judicial action: *Clarke v. White*, 12 Pet. 178. Courts of equity may direct the cancelment of a contract for fraud or mistake, but they cannot alter the contract: *Brooks v. Stoley*, 3 McLean, 523.

42. Mistake.—It is not true, as a legal proposition, that a mistake is constructive fraud: *Mercier v. Lewis*, 39 Cal. 532. An allegation of actual fraud is not sustained by proof of a mistake: *Id.* Where in a negotiation for the sale of land the vendor points out to the vendee, as the subject of the proposed sale, land belonging to another person, and the vendee accepts a deed of land belonging to the vendor, supposing it to be the land so pointed out, he may recover damages for the misrepresentation, without proof of any fraudulent intent: *Bird v. Kleiner*, 41 Wis. 134.

43. Misapplication of Money.—All persons in interest must be joined in a suit against a party for misapplication of money collected by him: *Harris v. Schultz*, 40 Barb. 315. A charge of embezzlement, and praying that defendant be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud: *Porter v. Hermann*, 8 Cal. 623. The facts which constitute the fiduciary capacity, its nature and extent, should be stated in direct and positive terms. It is necessary, in such a case, to charge not only that defendant received the money as agent, but that he converted it in the course of his employment as such. The allegation that the defendant collected the

money as agent or attorney in fact is, in substance, that the defendant collected the money as agent, or, if not as agent, then as attorney in fact: *Id.* The embezzlement by an officer of a national bank, of a special deposit in such bank, is not made punishable by any statute of the United States, and may therefore be punished under a state law. Otherwise, of such embezzlement of the property of the bank: *State v. Tuller*, 34 Conn. 280.

44. Patent to Land.—Fraud may be shown at law in the procurement of a patent, or the execution of a deed: *Cooper v. Roberts*, 6 McLean, 93. In an action to set aside a patent for land, on the ground that it was procured by false suggestions, fraudulent concealments and by misrepresentations, the acts of fraud and misrepresentation must be specified in the complaint: *Semple v. Hagar*, 27 Cal. 163. Where a party, in order to bring himself within a class of legislative grantees, must exhibit his muniments of title, fraud may be shown to prove that they have been dishonestly obtained: *Seabury v. Field*, 1 McAll. 60. When it appears that the relator is the real party in interest, and that the state has no direct interest in the event of the suit, he has a right to the control of the suit, and is responsible for its commencement, conduct and costs: *People ex rel. Rondel v. Nor. San Fran. Homestead and R. R. Assn.*, 38 Cal. 564.

45. Patent to Land—Form of Complaint.—A complaint in the name of the people, at the relation of an individual, to cancel a patent, which merely avers that the relator is seized and possessed of the land, and that his title was derived from the state of California, under and by virtue of the location of a school warrant, made under and in accordance with the provisions of an act of the legislature; that said location was duly and properly made, and in all respects according to the provision of said act, does not state facts sufficient to constitute a cause of action: *People v. Jackson*, 24 Cal. 632. A general averment of the performance of conditions precedent is sufficient in actions on contracts, but in other cases the facts showing the performance must be alleged: *Id.* A complaint in equity, filed for the purpose of setting aside a grant, on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud: *Oakland v. Carpentier*, 21 Cal. 642.

46. Pleading.—To maintain an action to recover damages for deceit in inducing plaintiff to purchase worthless property, it is not necessary to show a return, or offer to return the property. The action is *ex delicto* and not upon contract; and an averment in the complaint of an offer to return may be disregarded: *Miller v. Barber*, 66 N. Y. 558.

47. Relief from Fraud.—In actions for relief against fraud, the fraud, and not the discovery, is the substantive cause of action: *Sublette v. Tinney*, 9 Cal. 423; *Carpentier v. Oakland*, 30 Id. 444. Relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue: *Noonan v. Lee*, 2 Black, 499. And allegations of fraud in a bill, which allegations are subsequently withdrawn, cannot aid the jurisdiction: *Adams v. Preston*, 22 How. U. S. 473; see note 4, *ante*.

48. Return of Purchase-money.—When a plaintiff is in a condition to rescind a contract, he may recover back in assumpsit the money paid on it: *Crossgrove v. Himmelrich*, 54 Penn. 203. Where an action is in disaffirmance of a contract to recover back the price paid, and it appears that the plaintiff has complied up to the time of electing to rescind, tender or offer of

the money which would have been due on completion is not essential: *Id.* Where an action is in affirmance of a contract, an offer of readiness to pay is material: *Id.*

49. Return, Allegation for.—That on, etc., as soon as he had ascertained that the said representations were untrue, he demanded of defendant a return of said dollars, which defendant refused and still refuses.

50. Sale by Wife.—While property after a sale under a foreclosure was subject to redemption, the wife, by her quitclaim deed, conveyed all her interest in it to S., for an inadequate consideration, and immediately thereafter S. conveyed it to C., who furnished the money which was paid to the wife: *Held*, that she is not entitled to rescind the contract of sale: *Perkins v. Center*, 35 Cal. 713. The rights of the wife in the homestead cannot be prejudiced by fraudulent acts of the husband, where she did not participate: *Barber v. Babel*, 36 Id. 11.

51. Statute of Limitations.—A cause of action on the ground of fraud is barred after three years from the perpetration of the fraud: *Carpentier v. Oakland*, 30 Cal. 444. If the plaintiff wishes in such a case to bring himself within the exception of the statute, he must allege the fact of a discovery of a fraud at a period bringing him within the exception: *Id.*; see Cal. Code C. P., sec. 338, sub. 4. The complaint should also aver that the acts constituting the fraud had been discovered within three years: but if the replication contains this averment, and this issue is tried without objection, the irregularity in the answer of presenting the issue will be disregarded: *Boyd v. Blankman*, 29 Cal. 20. If plaintiff alleges fraud to have been committed more than three years before the commencement of his action, to bring himself within the exception of the statute, he must allege the fact of a discovery at a period bringing him within the exception: *Sublette v. Tinney*, 9 Cal. 423; *Boyd v. Blankman*, 29 Cal. 20; *Carpentier v. City of Oakland*, 30 Cal. 444.

52. Time must be Alleged.—And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been before made: *Stearns v. Page*, 7 How. U. S. 819.

53. Warranty—Waiver of.—An express warranty may be waived as a contract, and an action maintained upon the same general transaction for fraud and deceit. To do this the warranty must have been made with knowledge by the warrantor that it was false, and must have been accepted by the warrantee without such knowledge: *Larey v. Taliaferro*, 57 Ga. 43.

No. 510.

ii. For Procuring Property by Fraud.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that he was solvent, and worth dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell [and deliver] to the defendant [certain goods, wares, and merchandise] of the value of dollars.

III. That the said representations were false [negative each false statement specifically], and were then known by the defendant to be so.

IV. That the defendant has not paid for the said goods.

[*Demand of Judgment.*]

54. Action Lies.—Where money or property is procured upon credit by fraud, an action of debt will lie before the term of credit has expired: 3 Taunt. 274; 3 M. & Selw. 191; 4 Greenl. 306; 6 Johns. 110; 1 Com. on Con. 38. And where money is fraudulently obtained on a promissory note, a suit brought to recover the money disregarding the note is not an affirmance of the note: *Gibson v. Stevens*, 3 McLean, 551. Any false representation or artifice by a purchaser of goods, if the seller is thereby induced to part with them, which otherwise he would not have done, will invalidate the sale, whether the purchaser is solvent or insolvent: *Klopenstein v. Mulcahy*, 4 Nev. Rep. 296. A sale of goods on credit will be avoided where the buyer, knowing himself insolvent, purchases with the intention of not paying for them, although no false representations are made by him: *Klopenstein v. Mulcahy*, 4 Nev. Rep. 296.

55. Essential Averments.—The intention to influence the plaintiff by the false representations should be alleged: *Cazeaux v. Mali*, 25 Barb. 578. The complaint must show what the representations were: *Wells v. Jewett*, 11 How. Pr. 242. And the falsity must be shown to have existed at the time the representations were made: *Bell v. Mali*, 11 How. Pr. 254. That he falsely and fraudulently represented, etc., it has been held is a sufficient averment of knowledge that his representations were false: *Thomas v. Beebe*, 25 N.Y. 244; *Bayard v. Malcolm*, 2 Johns. 550; compare *Evertson v. Miles*, 6 Johns. 138; *Panton v. Holland*, 17 Id. 92. Where goods were sold upon the false representations of the purchaser, no title to them passed by the sale: *Martin v. Levy*, Cal. Sup. Ct., Jul. T., 1869; citing *Bell v. Ellis*, 33 Cal. 620. But such false representations will not avoid the sale unless it appears that the seller was thereby induced to do that which he would probably not have done but for them: *Klopenstein v. Mulcahy*, 4 Nev. Rep. 296.

56. Fraud in Sale.—To recover, the fraud must have been practiced on the complainant: *Simpson v. Wiggins*, 3 Woodb. and M. 413. The doctrine of fraud in sales discussed in *Smith v. Richards*, 13 Pet. 26; *Blydenburgh v. Welsh*, Baldw. 331.

No. 511.

iii. *Against a Fraudulent Purchaser and his Transferee.*

[TITLE.]

The plaintiff complains and alleges:

I. That on the day of, 187., at, the defendant A. B., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff

that [he was solvent, and worth dollars over all his liabilities].

II. That the plaintiff was thereby induced to sell and deliver to the said A. B. [one thousand cases of machine oils].

III. That at the time of making the said representations, the said A. B. was insolvent, and knew himself to be so.

IV. That the said A. B. afterwards transferred the said goods to the defendant C. D.

Wherefore the plaintiff demands judgment:

1. For the possession of the said goods, or for dollars, in case such possession cannot be had.

2. For dollars damages for the detention thereof.

NOTE.—It need not be alleged that the transferee received the goods without notice or without consideration. He must prove that he paid value, and acted in good faith: *Tallman v. Turck*, 26 Barb. 167; compare *Stevens v. Hyde*, 32 Id. 171.

57. Disavowal of Sale.—On a fraudulent purchase the seller may disavow the sale and reclaim the goods, or affirm the sale and sue for their price; and in the latter case it seems that an injunction may be granted under sec. 219 of the code, restraining the buyer from disposing of the goods: *Malcolm v. Miller*, 6 How. Pr. 456; *Erpstein v. Berg*, 13 Id. 91.

58. Injunction.—Where the transfer has already been made, none but a judgment-creditor can restrain a disposition of the property by the fraudulent assignee: *Reubens v. Joel*, 13 N. Y. 488; *Bayaud v. Fellows*, 28 Barb. 451; *Perkins v. Warren*, 6 How. Pr. 341; *Sebring v. Lant*, 9 Id. 346.

No. 512.

iv. *For Fraudulently Procuring Credit to be Given to Another Person.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the defendant represented to the plaintiff that one C. D. was solvent and in good credit, and worth dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell to the said C. D. liquors of the value of dollars [on months credit].

III. That the said representations were false in this, that the said C. D. was not then and there solvent and in good credit, and worth dollars over all his liabilities, but, on the contrary thereof, the said C. D. was then and there insolvent and not in good credit, all of which was well

known to the defendant, and said representations were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

IV. That the said C. D. did not pay for the said goods at the expiration of the credit aforesaid [or has not paid for the said goods, and the plaintiff has wholly lost the same by reason of the premises].

[*Demand of Judgment.*]

59. Essential Averments.—In an action to recover back property which had been fraudulently obtained upon credit, it is not necessary to aver that the plaintiff tendered back the notes received from the purchaser. The fact of tendering back such notes only goes to show that the plaintiff has not affirmed the contract after he had knowledge of the fraud: *King v. Fitch*, 1 Keyes, 432. Deceit on the part of the defendant and damage to the plaintiff are the cause of action, without alleging that the defendant reaped any benefit or advantage therefrom: *White v. Merritt*, 7 N. Y. 352. So of the assertion of a falsehood with a fraudulent design, when a direct and positive injury arises from the assertion: *Benton v. Pratt*, 2 Wend. 385. For the proper mode of pleading in such actions, for fraudulently inducing a third person to represent an insolvent as worthy of credit, see *Addington v. Allen*, 11 Wend. 374. The mere insolvency of the purchaser of goods on credit, although well known to himself, if no false representations are made, and no artifice used, will not avoid a sale to him: *Kloppenstein v. Mulcahy*, 4 Nev. Rep. 296.

60. False Recommendation.—A false recommendation of the credit or property of a third person, with knowledge that it is untrue, and with intent to gain credit for such third person, is a fraud for which the party giving it may be held liable: *Russell v. Clark*, 7 Cranch, 69. But if the representation is honestly made, the fact that it was not true does not constitute it a fraud: *Id.* Thus, a mistaken opinion of the value of property, if honestly entertained, and stated merely as an opinion, unaccompanied by any statement untrue in fact, is not fraudulent: *Speiglemyer v. Crawford*, 6 Paige, 254; *Fisher v. Boody*, 1 Curt. C. Ct. 206. But making statements without knowledge, which induced the seller to sell, and which are false in material points, are fraudulent: *Warner v. Daniels*, 1 Woodb. & M. 107; *Mason v. Crosby*, *Id.* 353; *Smith v. Babcock*, 2 *Id.* 246.

61. That the Representations were False.—As to the necessity of this averment, see *Zabriskie v. Smith*, 13 N. Y. 330; *Addington v. Allen*, 11 Wend. 386. If the complaint states the representations that were made, stating them as representations of fact, made by the defendants of their own knowledge, and not as expressions of opinion or belief, that they were false, that plaintiff relied on them, and that he suffered damages thereby, would be sufficient: *Sharp v. Mayor of N. Y.*, 40 Barb. 256. The complaint averred a fraudulent agreement between the defendants L. and another (composing a firm) and G., to obtain goods on G.'s credit, on representations made by L. of G.'s solvency, and that the representation of L. and the purchase of G. "were made in pursuance of such fraudulent agreement, and were a device and contrivance:" *Held*, sufficient: *Ballard v. Lockwood*, 1 Daly, 158.

62. Title does not Pass.—Where goods were sold upon credit, upon representations that left the impression on the seller that the buyer possessed mining claims, which were of themselves an “immense fortune,” and these representations were false, no title to the goods passed to the buyer: *Bell v. Ellis*, 33 Cal. 620.

63. When Action Lies.—An action lies for a false and fraudulent representation whereby another has suffered damage: *Marshall v. Buchanan*, 35 Cal. 264. And the question of fraudulent intent is a question of fact for the jury: *Tully v. Harloe*, 35 Cal. 302. The principles upon which the action is based, and the authorities which support it, collected in *Addington v. Allen*, 11 Wend. 374. Such an action cannot be joined with a cause of action on a guaranty of the amount of purchase: But see *Robinson v. Flint*, 7 Abb. Pr. 393, note.

No. 513.

v. Against Directors of a Corporation for Damages Caused by their Misrepresentations.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the time hereinafter mentioned, at, a corporation was formed, or pretended to be formed, for the purpose of insuring property against losses by fire, and for other purposes; which corporation was named the Insurance Company.

II. That the said company was organized or pretended to be organized under the provisions of a law of this State, passed [date of act], entitled “An Act,” etc.

III. That the charter of the said company provided, among other things, that the capital thereof should be dollars, to be paid up in cash.

IV. That at the times hereinafter mentioned, the defendants were [or represented themselves to be] directors of said company.

V. That at sundry times between the . . . day of, 187 . . , and the . . . day of, 187 . . , the defendants represented to the public at large [or to the plaintiff] that the said company had a paid up cash capital of dollars.

VI. That on the . . . day of, 187 . . , at, the defendants published a statement showing that the profits of the said company amounted to dollars, and declared a dividend of . . . per centum.

VII. That the said representations were wholly false, and were then known by the defendants to be so, and were made

with intent to deceive and defraud the public, and to induce persons to insure with the said company. That the said company never had a cash capital of more than..... dollars, and had not on the said....day of....., 187..., more than.....dollars profits.

VIII. That by the said representations the plaintiff was induced to insure with the said company; which accordingly issued to him a policy of insurance, of which a copy is hereto annexed, marked "Exhibit A."

IX. That on the....day of....., 187..., the property mentioned in the said policy was destroyed or greatly injured by fire, and the plaintiff's loss thereon amounted todollars.

X. That on the....day of....., 187..., at....., the plaintiff obtained judgment against the said company upon the said policy, for.....dollars, in the..... Court, of.....

XI. That on the [same day] an execution was issued upon the said judgment, against the property of the said company, to the Sheriff of the County of, which was returned wholly unsatisfied.

XII. That by reason of the premises, the plaintiff has lost the whole amount of the said judgment.

[Demand of Judgment.]

[Annex Copy of Policy, marked "Exhibit A."]

64. Averment of Fraud.—A general averment that the officers of a corporation, "with intent to deceive and defraud those who might become purchasers and owners of the stock," was held sufficient on demurrer: *Morse v. Swits*, 19 How. Pr. 275. Alleging that he "falsely and fraudulently represented" a thing to be what it was not, is not enough. Knowledge or intent to deceive on the part of the defendant must be alleged: *Mabey v. Adams*, 3 Bosw. 346. A general allegation of fraud will not be regarded: *Oroville and Va. City R. R. Co. v. Superv. of Plumas Co.*, 37 Cal. 354.

65. Contract Ultra Vires.—A shareholder, in behalf of himself and the other shareholders, may maintain a bill to set aside an agreement by the company as *ultra vires*, without joining as defendants any of the shareholders who have assented to the agreement: *Clinch Financial Corporation*, Law Rep. 4 Ch. 117.

Form.—For a complaint in an action by the receiver of an insurance company, organized under the general law applicable to such companies, which, being insolvent, has distributed its capital among its stockholders, see *Osgood v. Laytin*, 5 Abb. Pr. (N. S.) 1.

Fraudulent Issue of Stock.—For a form of complaint brought by a

corporation for a fraudulent issue of stock, which was on demurrer sustained in the New York court of appeals, see *New York and N. H. R. R. Co. v. Schuyler*, 7 Abb. Pr. 41; *Geery v. N. Y. and Liverpool S. Ship Co.*, 12 Abb. Pr. 268.

68. Fraudulent Representations. — For fraudulent representations whereby plaintiff was induced to purchase stock, see, also, *Morse v. Swits*, 19 How. Pr. 275; *Mabey v. Adams*, 3 Bosw. 346. It is not essential that the representation should be addressed directly to the plaintiff, but he must have come to the knowledge of it before his purchase: *Cazeaux v. Mali*, 25 Barb. 578.

69. Fraudulent Representations of Value.—In an action for fraudulent representations of the value of stock, although the complaint does not allege in terms that the defendant's representations were read by or came to the knowledge of the plaintiff, yet, if it is alleged that she was induced by these representations to purchase the stock of the company, and in exchange for them to convey lands, it is sufficient: *Newbury v. Garland*, 31 Barb. 121; compare *Mabey v. Adams*, 3 Bosw. 346. If any fraud is practiced upon a stockholder, which induces him to transfer his shares to the company for less than they are worth, he may be relieved in a court of equity: *Hager v. Thompson*, 1 Black, 80.

No. 514.

vi. *Against Seller, for Fraudulently Representing Chattels to be his Property.*

[TITLE.]

The plaintiff complains and alleges:

I. That on the day of, 187., the defendant offered to sell to the plaintiff a certain horse, and, with intent to deceive and defraud the plaintiff, did falsely and fraudulently represent to him that said horse was his property.

II. That the plaintiff, relying on said representations, purchased said horse of the defendant, and paid him therefor the sum of dollars.

III. That, in truth, and as defendant then well knew, said horse was not the property of the defendant, but was the property of one A. B.

IV. That thereafter the said A. B. sued this plaintiff in the, to recover the value of said horse, and although this plaintiff used due diligence in the defense of said suit, the said A. B. recovered a judgment against the plaintiff in said Court for the sum of dollars, which this plaintiff has since paid.

V. That on the day of, 187., notice of the pendency of said suit was given to the defendant [or

that the said defendant appeared as a witness in said action].

VI. That by reason of the premises the plaintiff has been damaged in the sum of dollars.

[*Demand of Judgment.*]

70. Consideration.—The action may be maintained, though there was no consideration: *Barney v. Dewey*, 13 Johns. 224; *Corwin v. Davison*, 9 Cow. 22. The averment of price paid goes only to the amount of damages.

71. Fraudulent Sale.—Circumstances tending to show fraud in reference to the adjournment of a sale previously notified, under proceedings which had been subsequently abandoned, and the present proceedings commenced anew, *held* not to amount to fraud in the sale: *Leet v. McMaster*, 51 Barb. 236. Fraudulent representation or deceit, accompanied by damage, constitute a good ground of action in respect to a sale of lands: *Crandall v. Bryan*, 5 Abb. Pr. 162; *Clark v. Baird*, 9 N.Y. 183; and see *Van De Sande v. Hall*, 13 How. Pr. 458.

72. Inducement.—The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, should aver their falsity, and that they were made with the intent to deceive the plaintiff, and induce him to make the purchase in question, and that they did induce such trade, to the plaintiff's injury: *Barber v. Morgan*, 51 Barb. 116. Complaint for deceit or fraud by which plaintiff was induced to purchase: *Id.* The plaintiff must in substance aver, not only that the defendant made the representations to induce the plaintiff to purchase, but that they were intended to defraud or deceive him: *Id.*

73. Notice.—A notice to defendant of the pendency of the suit: *Blasdale v. Babcock*, 1 Johns. 517. An allegation that defendant was a witness at the trial of the owner's action is equivalent to an averment of notice: *Barney v. Dewey*, 13 Johns. 224; *Corwin v. Davison*, 9 Cow. 22.

74. On Faith of Representations.—A complaint alleged that at the sale and transfer of a note and mortgage, "the defendant represented to the plaintiff, that said mortgage was good, and a valid security for the payment of said note, and the plaintiff supposed and verily believed, at the time he bought the same as aforesaid, the said mortgage to be good, and that it was a valid and sufficient security, etc.:" *Held* to be a sufficient allegation that the plaintiff purchased on the faith of the defendant's representations: *Hahn v. Doolittle*, 18 Wis. 196.

75. Recovery.—Recovery by the rightful owner against the buyer is conclusive against the fraudulent seller: *Barney v. Dewey*, 13 Johns. 224.

76. Silent Acquiescence in Fraud.—If an owner stands by and suffers an innocent person to be misled by his silence, it is a fraud upon the purchaser: *The "Sarah Ann,"* 2 Sumn. 206; affirmed, 13 Pet. 387. But the mere fact of a wife remaining silent as to her rights, is not a circumstance sufficient to affect her with the fraud: *Bank of United States v. Lee*, 13 Pet. 107.

77. Silent Partner.—A silent partner, who did not know nor assume to know as to the truth of a statement of the condition of the firm made by one of his copartners, is not liable for fraud effected by such statement: *Chamberlain v. Prior*, 2 Keyes, 539.

78. Sale Under Warranty.—Under the forms of pleading at common law, the vendee of chattels, sold with a warranty of title, could, on a breach of the warranty, recover damages in assumpsit, or he might sue in an action on the case for deceit, if there had been deceit, as well as a warranty of title; but in either case he must plead specially: *Miller v. Van Tassel*, 24 Cal. 463; see “Complaints on Warranties,” vol. I, p. 548 *et seq.*

79. Sufficient Averments.—Averring “that defendant falsely pretended to be the owner” of a certain chattel, and “that he fraudulently sold it to the plaintiff, whereby he became liable,” fixes the gravamen of the action as fraud: 2 Johns. 560; 13 Id. 224; *Edie v. Crim*, 10 Barb. 445; and see *McGovern v. Payn*, 32 Id. 83. That actions of this description are founded on the fraud, not on the contract, see *McDuffie v. Beddoe*, 7 Hill, 578.

No. 515.

vii. *The Same—For Fraudulently Delivering Smaller Quantity than Agreed For.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff, on the....day of....., 187..., at....., bought of the defendant, and the defendant sold and agreed to deliver to the plaintiff one hundred tons of hay, for the price of.....dollars per ton.

II. That the defendant afterwards, on the.....day of....., 187..., fraudulently delivered to him only ninety tons of hay, as and for the said quantity of one hundred, so bargained for and sold, and pretending it so to be.

III. That the defendant at the time well knew that the hay so delivered contained only the quantity of ninety tons, to the damage of the plaintiff... ..dollars.

[Demand of Judgment.]

No. 516.

viii. *To Set Aside a Judgment Fraudulently Obtained.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., said defendant made and delivered to one N. B. his two certain promissory notes, each for the sum ofdollars, payable to the order of said N. B., one of which notes was due and payable on the....day of....., 187., the other on the....day of....., 187., and which notes bore interest at the rate of....per cent. per....., and afterwards and before the day next hereinafter mentioned, both of said notes were by the said N. B. indorsed and delivered to the

plaintiff, who then became and now is the legal indorsee and holder of the same, all of which still remain unpaid.

II. That on the day of, 187., the plaintiff commenced an action against the defendant to recover the amount due on these notes, and procured an attachment to be issued, which on the same day was levied by the defendant E. N., Sheriff of said County of, on seven cows, five calves, one heifer, one cart, one buggy and harness, a quantity of poultry, one stack of hay, containing about three tons, and some hay under a shed, all of the probable value of five hundred dollars.

III. That on the day of, 187., judgment was entered by the Deputy Clerk of this Court in vacation, wherein the said A. H., S. W. L., and D. F., were named as plaintiffs, and the said J. E. as defendant, in favor of said plaintiffs, and against said defendant for the sum ofdollars, anddollars costs. That the papers comprising the judgment-roll consist [enumerate them, as]: First. Of an affidavit, etc. [describe it]; Second. A paper purporting to be signed, etc. [describe it]; Third. A bill of costs, etc. [describe it].

IV. That, as plaintiff is informed, and believes to be true, on the said day of, 187., the said A. W., pretending to act as attorney at law of the said H., L. and B., presented to A. M., the Deputy Clerk of this Court, the first four papers heretofore mentioned, which at the time of presenting the same were all attached together, and thereupon requested the Deputy Clerk to file the same, and to enter up a judgment thereon in favor of said H., L. and B., for dollars, anddollars costs, and to issue immediate execution therefor to the Sheriff of this County, all of which the said Deputy Clerk then and there did, as requested by said W., and said Deputy Clerk also, at the request of said W., filled up and filed away among the said papers a summons in the said action.

V. That, as plaintiff is informed, and believes to be true, previous and up to the time when said papers so attached together were filed as aforesaid, no complaint had been filed, nor had any suit or action been commenced between said parties; nor had any summons been issued from said Clerk's office; nor even the form of one filled up in said action, all

of which facts are more fully shown by the affidavit of said A. M., hereto annexed, marked "Exhibit A," and made a part of this complaint.

VI. That said P. E., Sheriff of this County, received the said execution issued on said judgment on the day of, 187., and, on the day of said month, levied the same on the property above specified and described, and which levy is prior to said plaintiff's attachment.

VII. The plaintiff further alleges that the said proceedings and circumstances under which said judgment was entered up by the said Deputy Clerk, render the same void in law, the said Clerk having no power or jurisdiction to enter such judgment under the circumstances and in the manner before stated, and that the same is fraudulent as against the plaintiff, and tends to his great and irreparable injury, and that the said fraudulent and void judgment was consummated under the advice and by the connivance of said defendant W., who was employed, as plaintiff is informed and believes, by said E., and confederated with him and said H., L. and B., to procure to be entered upon the records of said Court said false, covinous and fraudulent judgment.

VIII. That the defendant E. is insolvent, and has no visible property except the aforesaid, subject to execution.

IX. That defendant E. as such Sheriff as aforesaid, has, as plaintiff is informed and believes, advertised said property for sale, under the execution issued upon said fraudulent and void judgment, to be sold on the of inst., at o'clock A. M., and if allowed to proceed with said sale the plaintiff will be prejudiced to the amount of said property, and will probably lose his said debt, and it will produce to him a great and irreparable injury.

Wherefore the plaintiff prays:

1. For a decree of this court, that the judgment so entered as aforesaid, and the execution thereon issued, may be declared void, as against the plaintiff and the creditors of said E., and that it, together with the said writ of execution issued thereon, may be wholly vacated and annulled.

2. That the said property seised and taken under said execution, and the proceeds of the sale thereof, may be

subjected to the writ of attachment issued as aforesaid in the action of the plaintiff against said defendant E., and for such further or other relief as to this court may seem meet in the premises, and for costs of suit against defendants.

3. And in the meantime that an order of injunction may issue out of this court, enjoining and restraining the defendants, their attorneys, agents and servants, and particularly the said E., as such Sheriff, from selling the said property under said execution, and from in any way disposing of or intermeddling with said property, or in any way selling or disposing of said judgment so entered in favor of said H., L., and B., against said E.

[*Annex Copy of Affidavit, marked "Exhibit A."*]

80. Form of Complaint from *Crane v. Hirschfelder*, 17 Cal. 367. A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise: *Carpentier v. Hart*, 5 Cal. 407. For a complaint to set aside a judgment on the ground of newly-discovered evidence, and for fraud, see *Munn v. Warrall*, 16 Barb. 221; *Hamel v. Grimm*, 10 Abb. Pr. 150. To restrain a corporation from enforcing a judgment, on the ground that it has ceased to be a corporation, see *Sutherland v. Lagro*, 19 Ind. 192.

81. Fraud and Deception.—If the plaintiff relies on fraud and deception, practiced on the court in the matter of evidence, the complaint must show that he was thereby defrauded of his opportunity to defend, and that his defense would otherwise have been effectual: *Riddle v. Baker*, 13 Cal. 295. A party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered.

82. Fraud, how Alleged.—Where a creditor files a bill to cancel and set aside a judgment rendered against his debtor, on the ground that it is fraudulent, it is not sufficient to aver in general terms that said judgment or conveyance was fraudulent; the facts and circumstances constituting the alleged fraud must be set forth: *Castle v. Bader*, 23 Cal. 75; see, also, *Snow v. Halstead*, 1 Cal. 359. And if he wishes in addition to reach the property of the debtor, and have it applied in satisfaction of his demand, the complaint must aver, either that the plaintiff has acquired a lien on the property he seeks to reach, or that he has recovered a judgment, upon which an execution has been issued and returned, and no property found: *Id.* Where plaintiff alleged that he was satisfied that defendant secured certain property through fraud, the issue tendered was immaterial in not presenting a point upon which the case could be decided upon its merits: *Snow v. Halstead*, 1 Cal. 361.

83. Judgment by Confession.—Where a judgment by confession is attacked by a creditor as fraudulent against him, on the ground that the object of the debtor and the judgment-creditor was to assist the debtor in forcing a compromise with his other creditors, rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A gen-

eral averment that the intent was to hinder, delay and defraud, will not put the adverse party on his defense: *Meeker v. Harris*, 19 Cal. 278. A judgment by confession, where the court has jurisdiction of the subject-matter and the parties, however irregular and erroneous it may be, cannot be called in question in a collateral proceeding, if it was entered in open court, and regularly signed by the judge under the existing practice: *Cloud v. El Dorado Co.*, 12 Cal. 133; *Arrington v. Sherry*, 5 Cal. 513. It may be attacked for fraud by creditors of the judgment-debtor, who were defrauded thereby, and that in some direct proceeding, before the sale of the property under it to innocent parties: *Miller v. Earle*, 24 N. Y. 111; see *Wilcoxon v. Burton*, 27 Cal. 229; cited in *Lee v. Figg*, 37 Id. 328.

84. Judgment by Default.—In a suit in equity, to set aside a judgment by default on a return by the sheriff of personal service, on the ground that defendant in fact was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought: *Held*, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was or has been at any time ready or willing to perform the same: *Gibbons v. Scott*, 15 Cal. 284.

85. Judgment on Stipulation.—Where a judgment was entered upon a stipulation of the attorneys in the action, and the defendants in the action subsequently brought a suit to annul the judgment for fraud and collusion, the facts and circumstances, and the merits of their defenses in the former suit, are a part of the subsequent action, and may be shown: *Preston v. Hill*, 38 Cal. 686.

86. Legal Remedy must be Exhausted.—To obtain the aid of chancery for relief against a fraudulent judgment, it must be shown that the plaintiff has exhausted all proper diligence to defend the action in which judgment was rendered: *Riddle v. Baker*, 13 Cal. 295. Where the complaint contains no averment showing that relief could not have been obtained on motion, it may be demurrable; but if the fact appears on the record, and no demurrer be interposed, but defendant goes to trial on the merits, the objection is waived: *Bibend v. Kreutz*, 20 Cal. 109.

No. 517.

ix. For Rescission of Contract on the Ground of Mistake.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187 . . ., the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at, contained twenty acres.

II. That the plaintiff was thereby induced to purchase the same, at the price of dollars per acre, in the belief that the said representation was true, and signed an

agreement, of which a copy is hereto annexed, and marked "Exhibit A," and made a part hereof. But no deed of the same has been executed to him.

III. That on the day of, 187., the plaintiff paid the defendant dollars, as part of such purchase-money.

IV. That the said piece of ground contained in fact only ten acres.

Wherefore the plaintiff demands judgment:

1. For dollars, with interest from the day of, 187..

2. That the said agreement of purchase be delivered up and canceled.

87. Action Lies.—It is a well settled principle that mistakes in written instruments may be corrected in a court of equity, and it will not only go back to the original error and reform it, but will administer complete justice by correcting all subsequent mistakes which grow out of and were superinduced by the first: *Quivey v. Baker*, 37 Cal. 465.

88. As to Quantity.—When the fraudulent representations relate to the quantity of the land, it is immaterial whether the sale is in gross or by the acre: *Thomas v. Beebe*, 25 N. Y. 244.

89. Knowledge of Plaintiff.—Though the fact that the complainant had means of ascertaining the facts will ordinarily defeat a suit to rescind a contract on the ground of mistake merely, it will not prevent a recovery if actual fraud is shown to have been practiced upon him to induce him to make the contract: 1 Story Eq. Jur. 192, 222; 7 Paige, 124; 2 P. Wms. 154; 2 Sim. 289; 1 Sch. & L. 429; *Warner v. Daniels*, 1 Woodb. & M. 90; S. C., 9 Law Rep. 160; *Mason v. Crosby*, 1 Woodb. & M. 342, 352; *Tuthill v. Babcock*, 2 Id. 298. Fraud vitiates all contracts tainted by it, and may be set up whether a warranty was given or not: 1 Wash. C. Ct. 170; 1 Day, 156; 4 D. & E. 67; Id. 337; 6 Johns. 110; 7 Mass. 68; *Smith v. Babcock*, 2 Woodb. & M. 246; *Tyler v. Black*, 13 How. U. S. 230.

90. Mistake of Fact.—"Mistake of fact is a mistake, not caused by the neglect of a legal duty, on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing which has not existed:" Cal. Civ. Code, sec. 1577. Mistake of foreign laws is a mistake of fact: Id., sec. 1579.

91. Mistake of Law.—"Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from: 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or, 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify:" Cal. Civ. Code, sec. 1578.

*No. 518.***x. To Reform a Conveyance by Mistake in the Boundary.**

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of, 187., the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy [give copy of deed].

II. That the description therein given of the premises intended to be conveyed was erroneous, and in fact does not describe any premises whatever [here insert wherein the error lies], and that in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows [here insert correct description of the premises].

III. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

Wherefore the plaintiff demands judgment:

1. That said deed be reformed as aforesaid.
2. For costs of this action.

92. Deed.—A complaint in equity to have a deed, absolute on its face, reformed so as to become a deed of trust, which avers that the deed does not express the trusts and conditions upon which it was agreed the property should be transferred, but that such conditions were by the defendants fraudulently suppressed, without any statements of what acts of fraud were practiced, does not state facts sufficient to constitute a cause of action: *Kent v. Snyder*, 30 Cal. 666. Where a party brings a bill to have a conveyance, which is absolute on its face, declared a mortgage to secure an oral promise to pay a certain sum of money in gold, and to redeem, he cannot redeem except on paying said sum in gold, and this not on the ground of the "Specific Contract Act," but because "he who seeks equity must do equity:" *Cowing v. Rogers*, 34 Cal. 648.

93. Mortgage.—For the allegations of a complaint seeking to reform a mortgage on the ground of fraud, and for foreclosure as reformed, see *DePeyster v. Hasbrouck*, 11 N. Y. 582. Facts should be distinctly stated entitling the plaintiff to relief: *Lamoureux v. Atlant. Ins. Co.*, 3 Duer, 680.

94. Terms of a Contract.—Of the rules of pleading applicable, where a party sued for non-performance of a contract in writing seeks to have it reformed so as to express the real intentions of the parties, see *Wemple v. Stewart*, 22 Barb. 154. A complaint seeking to have a written contract reformed, and for judgment thereon when reformed, states but a single cause of action: *Gooding v. McAlister*, 9 How. Pr. 123. Where in reducing an agreement to writing, a material clause has been omitted by mistake, a party seeking to

avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it, or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing: *Pierson v. McCahill*, 21 Cal. 122.

No. 519.

xi. *To Correct an Account, Stated.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff and defendant, having had mutual dealings, on the.....day of....., 187..., came to an accounting, upon which a statement of the said account was made in writing, a copy of which is annexed as a part of this complaint, marked "Exhibit A," whereby a balance of... ..dollars was found in favor of the defendant.

II. That since the said statement of account, the plaintiff has discovered errors and false charges therein, of which he was wholly ignorant at the time of such settlement.

III. That in the statement of said account so settled he is charged as follows: [state items wrongfully charged, and show the error.]

IV. That the following items, which ought to have been entered to his credit in said account, were by mistake wholly omitted therefrom, to wit: [specify the items, with date, amount, etc.]

V. That the said account is incorrect, and that the balance thereon should be.....dollars in favor of the plaintiff, instead of.....dollars in favor of the defendant.

VI. That as soon as the plaintiff discovered the said errors, to wit, on the day of, 187..., he pointed the same out to the defendant, and then requested the defendant to correct the same, and to restate the said account correctly, but the defendant refused to do so, or to pay the plaintiff any part of said sum of dollars, in accordance with the stated account as corrected.

Wherefore the plaintiff asks:

1. That he may be let in to prove the said errors in the stating of the said account, and that the same be corrected.

2. That judgment may be rendered against the defend-

ant for the said balance of dollars, on said corrected account, with interest thereon from the day of, 187..

[*Annex Copy of Account.*]

95. Fraudulent Account.—Where the board of supervisors of a county allowed an account presented for services as tax collector, and the auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a *bona fide* purchaser without notice: *Held*, that the county cannot go into equity to cancel the warrant and enjoin its collection as against M., on the ground that the account was false and fraudulent as to some of its items, and was allowed by the board through ignorance of the facts and mistake; that the supervisors were acting within the scope of their authority, and the county cannot visit upon an innocent party the consequences of their negligence: *El Dorado County v. Elstner*, 18 Cal. 144.

CHAPTER V.

INJUNCTION.

No. 520.

i. For Restoration of Personal Property Threatened with Destruction, and for an Injunction.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all times hereinafter mentioned was the owner of [a portrait of his father, or other relative], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

II. That on the day of, 187., he deposited the same for safe keeping with the defendant.

III. That on the day of, 187., he demanded the same from the defendant, and offered to pay all reasonable charges for the storage of the same.

IV. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut, or injure the same, if required to deliver it up.

V. That no pecuniary damages would be an adequate compensation to the plaintiff for the loss of the said [painting].

Wherefore the plaintiff demands judgment:

1. That the defendant be restrained by injunction from disposing of, injuring, or concealing the said [painting].

2. That he return the same to the plaintiff.

NOTE.—For cases when injunction will, and when it will not be allowed, see Cal. Civil Code, secs. 3422 and 3423.

No. 521.

ii. *For an Injunction Restraining Waste and Injury.*

[TITLE.]

The plaintiff complains, and alleges:

I. That he is the owner in fee of [describe the property].

II. That the defendant is in possession of the same, under a lease from the plaintiff, a copy of which is hereto attached marked "A," and made part hereof.

III. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more, for the purpose of sale], in violation of the terms of said lease, and without the consent of the plaintiff.

Wherefore the plaintiff demands judgment, that the defendant be restrained by injunction from committing or permitting any further waste on the said premises. [Pecuniary damages might also be demanded].

1. **Cancellation of Patent.**—In an action brought by the state to procure the cancellation of a patent for land sold without authority of law, where the person claiming under the patent is engaged in removing mineral from the land, the state is entitled to an injunction restraining the defendant from removing the same: *People v. Morrill*, 26 Cal. 352.

2. **Cutting and Destroying Timber.**—Cutting, destroying and removing timber is sufficient ground for an injunction, without any allegations of insolvency: *Buckelew v. Estell*, 5 Cal. 108; *Henshaw v. Clark and one hundred and three Chinamen*, 14 Id. 460.

3. **Ejectment.**—At common law, an injunction cannot be allowed against waste, etc., in an action of ejectment. So held under the English statute, which resembles ours in this respect: *Baylis v. Le Gros*, 2 C. B. (N. S.) 322; 40 Eng. L. & Eq. 272; *Storm v. Mann*, 4 Johns. Ch. 21; *Davenport v. Davenport*, 7 Hare, 217; see 10 Abb. Pr. 111. An injunction will not be allowed against a judgment in ejectment on grounds which might have been set up as a defense in the action at law: *Agard v. Valencia*, 39 Cal. 292.

4. **Forcible Entry and Detainer.**—The complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined; and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit

being to preserve the property during the pendency of that action: *Held*, that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases, to grant first a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive: *Hicks v. Michael*, 15 Cal. 107; see 27 Cal. 643.

5. Homestead, Sale of.—An injunction will be granted restraining the sale of a homestead claimed under the laws of the United States, if the judgment, on which the execution issues, was recovered for a debt contracted before the homestead claim was patented: *Miller v. Little*, 47 Cal. 348.

6. Parties.—An injunction will be granted, at the suit of the mortgagee of real property, to restrain the commission of waste upon the mortgaged premises; but before it is granted, it must be made to appear that the commission of the threatened waste will materially impair the value of the mortgaged property, so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent, or unable to respond in damages for the threatened injury: *Robinson v. Russell*, 24 Cal. 473; see, also, Cal. Code C. P., sec. 745, and Civ. Code, sec. 2929. So, mortgagor in possession may be restrained from waste: 2 Johns. Ch. 148. But the mortgagee of a lot, on which a house is standing, cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot, without the house, will be an inadequate security for the mortgage debt: *Buckout v. Swift*, 27 Cal. 434. After a decree foreclosing a mortgage, the mortgagor in possession, until a sale is made under the decree, is not accountable either for rents, or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste: *Whitney v. Allen*, 21 Cal. 233; *Robinson v. Russell*, 24 Cal. 473. Injunction to stay waste by tenants in common lies in special cases: 2 Johns. Ch. 122. An injunction to stay waste will not be granted where the plaintiff does not show that he is entitled to the reversion: *Perrine v. Marsden*, 34 Cal. 14. A purchaser under a judgment, who has not paid the purchase-money, may be enjoined from waste without bringing a new action: *Casamajor v. Strode*, 1 Sim. & Stu. 381. Parties holding mechanics' liens on a building erected upon a leased lot are entitled to an injunction to restrain a judgment-creditor of the lessee, whose judgment is subordinate to the liens, from removing the building from the lot, when it appears that the security will be rendered insufficient by such removal: *Barber v. Reynolds*, 33 Cal. 497.

7. Partition.—In a bill for partition among tenants in common, and for injunction against cutting timber trees: *Held*, that defendants, being tenants in common, had the right to the enjoyment of the common estate, and to cut timber or use or dispose of it, at least to an extent corresponding to their share of the estate; and that as the complaint neither avers the insolvency of defendants, nor that they are exceeding this share, injunction does not lie: *Hihn v. Peck*, 18 Cal. 640.

8. Quieting Title.—Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to

prevent the defendant from cutting timber thereon: *Smith v. Wilson*, 10 Cal. 528.

9. Injunction when Plaintiff is in Possession.—An injunction lies to restrain a threatened injury to real property, in the nature of a waste, even if the plaintiff is in possession of the land: *Moore v. Massini*, 32 Cal. 590. But where the mischief is irreparable, or the defendant is insolvent, although the title is in dispute, under summary proceedings, injunction has been granted to stay waste: 4 How. Pr. 177; see 4 Kay & John. 126, 133.

10. Relief.—This peculiar relief cannot be granted in every case in which chattels are wrongfully detained. But it may be had whenever pecuniary damages would not afford an adequate remedy: *North v. Gt. Northern Railway Co.*, 2 Giff. 64. Or where the property is detained in a breach of trust: *Wood v. Rowcliffe*, 2 Phil. 382; 3 Hare, 309. Plaintiff must not only show that he will sustain present injury, but that he will be entitled to final relief, as a rule: *Crocker v. Baker*, 3 Abb. Pr. 182; *Wordsworth v. Lyon*, 5 How. Pr. 466. Plaintiff must also show equity on his part; and where his wall projects over the defendant's land, defendant will not be enjoined from using it as a party wall: *Guttenberger v. Woods*, 51 Cal. 523. And in addition to the above, it is held in the following cases that he must be entitled to relief by a final injunction: *Duigan v. Hogan*, 1 Bosw. 649; 16 How. Pr. 169; *Ward v. Dewey*, 7 How. Pr. 19; *Corning v. Troy Factory*, 6 Id. 93; *Townsend v. Tanner*, 3 Id. 384; see *Hulce v. Thompson*, 8 Id. 477. But the contrary was held in a later case: *Vermilyea v. Vermilyea*, 14 How. Pr. 470; 6 Abb. Pr. 511; and see *Laurie v. Laurie*, 9 Paige, 234. It is a preventive remedy merely, and cannot be so framed as to command a party to undo what he has done: *Fisher v. Board of Trade of Chicago*, 80 Ill. 85. An injunction granted upon the rendition of final judgment is a part of the judgment: *McGarrahan v. Maxwell*, 28 Cal. 84.

11. Restraint of Trade.—A covenant not to run or employ, or suffer to be run or employed, a steamboat, upon any of the routes of travel on the rivers, bays, or waters of the state of California, for the period of ten years, applies not only to existing routes of travel, but to all new routes opened during the ten years: *Wright v. Ryder*, 36 Cal. 342. An agreement in partial restraint of trade, restricting it within certain reasonable limits, or confining it to particular persons, is, if founded upon a good consideration, valid: Id. Such a contract, if it include the entire area of a state, is unreasonable and void, as against public policy: Id.

12. Tax Sale.—A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings, upon which the purchaser must rely to make out a *prima facie* case, to enable him to recover under the sale, that the sale would be void: *Bucknall v. Story*, 36 Cal. 67. Before equity will interfere by injunction, it must appear that, after a sale, a deed is about to be executed which will cast a cloud on the title: *Houghton v. Austin*, 47 Cal. 646; *Minturn v. Smith*, 3 Sawyer, 142. Or it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury: *Dows v. City of Chicago*, 11 Wall. U. S. 108. So, where an injunction is sought to restrain a sale under execution, the facts must clearly appear, and insolvency of defendant must be alleged: *More v. Ord*, 15 Cal. 204.

13. Trespass.—Where a bill avers that the plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent, and threaten to

and will enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiff's title, injunction lies: *Bensley v. The Mountain Lake Water Co.*, 13 Cal. 306. In an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for perpetual injunction, and the answer admits the entry and work, and takes issue upon the titles; if the jury, to whom the issue of title is submitted, finds in favor of the plaintiff, it is the duty of the court to decree the equitable relief sought, and enjoin defendants from future trespasses: *McLaughlin v. Kelly*, 22 Cal. 211. But the court should not extend it to land not owned by the plaintiff, although included in the complaint: *Moore v. Massini*, 43 Id. 389. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold: *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, 14 Id. 464. A writ of injunction will lie to restrain trespass in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law: *Merced Mining Co. v. Fremont*, 7 Cal. 317. Injunction should not be granted to restrain a mere trespass to real property, unless the bill clearly avers a good title in the plaintiff; nor generally even then where the injury is not destructive of the substance of the inheritance, or of that which gives it its chief value, or is not irreparable, but may be compensated in damages: *McMillan v. Ferrell*, 7 W. Va. 223.

14. Verification.—A complaint for an injunction must be verified: Cal. Code C. P., sec. 527.

15. What must be Shown.—The complaint must clearly show that there is no remedy at law: *Tomlinson v. Rubio*, 16 Cal. 202; *Leach v. Day*, 27 Id. 363; *Nev Co. and Sac. Co. Canal Co. v. Kidd*, 37 Id. 282. It is not indispensable that a bill for an injunction should contain a prayer for discovery: *Lawrence v. Bowman*, 1 McAll. 419. The simple allegation of "irreparable injury" is not sufficient; it should appear to the court from the facts set forth in the bill: *De Witt v. Hays*, 2 Cal. 463; *Branch Turnpike Co. v. Board of Supervisors of Yuba Co.*, 13 Id. 190; *Waldron v. Marsh*, 5 Id. 119. Plaintiff is entitled to an injunction upon the complaint alone, if it makes a proper case and is verified; but if he asks for injunction thereafter, he must do so upon affidavits: *Falkenburgh v. Lucy*, 35 Cal. 52.

No. 522.

iii. *The Same—For Injunction and Damages.*

[TITLE]

The plaintiff complains, and alleges:

I. That the plaintiff being then and ever since owner in fee of the premises hereinafter mentioned, on the . . . day of . . . , 187 , by a lease in writing then made between the plaintiff and the defendant, under their hands and seals, the plaintiff leased to the defendant for five years from said

date, at a yearly rent of dollars, a certain dwelling-house, with barns and outhouses attached, and two hundred acres of land at, in the County of, the property of the plaintiff.

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [Copy of the covenant as to waste.]

III. That the defendant took possession of the premises under said lease.

IV. That he has plowed up the garden, destroying the shrubbery and flowers therein, and has cut down six shade trees, and has also cut down forty fruit trees in the orchard [or state other waste, according to the fact], and has otherwise suffered and committed great waste on the premises; by reason of which waste the premises are worth dollars less than they were when the defendant took possession thereof, and it would cost dollars to restore them.

V. That the defendant threatens to cut down other of the ornamental, shade and fruit trees, and to remove the partitions in the house, and turn it into a workshop [or other threatened waste].

Wherefore the plaintiff asks judgment:

1. That he pay to the plaintiff dollars damages done to and suffered by the premises.

2. That he be required to keep the same in good repair and condition during the continuance of his interest therein, and to manage and cultivate the farm in a proper and husbandlike manner, according to the terms of the lease.

3. That he be enjoined from committing any further waste, and particularly from [state particular act to be enjoined], and for other proper relief.

16. Forfeiture.—A landlord cannot demand an injunction against a breach of covenant, in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent: *Linden v. Hepburn*, 3 Sandf. 668; S. C., 5 How. Pr. 188. In chancery, a bill for injunction in such case must waive forfeiture and penalty: 3 Atk. 457.

17. Form.—See Equity Draughtsman, 350; see, also, *Hawley v. Wolverton*, 5 Paige, 522; *Rodgers v. Rodgers*, 11 Barb. 595.

18. Injunction.—Injunction to restrain injuries in the nature of waste should not be issued before the hearing of the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from

controversy, or irreparable mischief will be produced by its continuance: *Hicks v. Michael*, 15 Cal. 116; 7 Johns. Ch. 315; *Sixth Av. R. R. Co. v. Kerr*, 28 How. Pr. 382, affirming S. C. 45 Barb. 138. In cases which are doubtful, to prevent irreparable mischief, a temporary injunction may be granted: *Thurston v. Mustin*, 3 Cranch C. Ct. 335: In actions for waste in cutting timber, it may be questionable whether an injunction is proper as to timber already cut, but the court having acquired jurisdiction, it may require defendant to give security to account as a condition, modifying the injunction in this respect: *Weatherly v. Wood*, 29 How. Pr. 404. Whether a provisional injunction should issue to stay anticipated waste in cases where the title to the premises is disputed: *Morse v. O'Reilly*, 6 Penn. Law J. 501; *United States v. Parrott*, 1 McAll. 271. Digging lead ore from the lead mines upon public lands in the United States is such a waste as entitles the United States to a writ of injunction to restrain it: *United States v. Gear*, 3 How. U. S. 120. A court of equity will in some cases enjoin against the removal of the fruits of past waste: *United States v. Parrott*, 1 McAll. 271. If plaintiff owns a ditch and right of way for the same, to conduct water for mining purposes, the court should not, in an action to enjoin another party from washing away the ground over which it passes, allow the defendant to wash away the ditch if he replaces it by a flume or other aqueduct, and gives a bond for damages, but should grant the injunction: *Gregory v. Nelson*, 41 Cal. 278.

19. When Action Lies.—Injury to real property must be continuing to authorize an injunction: *Coker v. Simpson*, 7 Cal. 34; *Tuolumne Wat. Co. v. Chapman*, 8 Cal. 392; *Mooney v. Cooledge*, 30 Ark. 640; *Shimer v. Morris Canal & B. Co.*, 27 N. J. Eq. 364. But if the trespass be fugitive and temporary, and capable of adequate compensation, an injunction will not be granted: *Minnig's App.*, 82 Pa. St. 373. An injunction ought not to be granted, unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown; as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like: *Burnett v. Whitesides*, 13 Cal. 156. As to injunctions for waste generally, see 13 Ohio, 322; 2 Green Ch. 467; 15 Conn. 556; 2 Johns. Ch. 148; 3 Bland. Ch. 125; 1 Johns. Ch. 501; 2 Carter, 469; 5 J. J. Marsh. 196; 1 Rhode Island, 272; 13 Penn. St. 438; 6 Eng. L. & Eq. Rep. 404; 12 Nev. 251. Whether a provisional injunction should issue to stay anticipated waste in cases where the title to the premises is disputed, see *Morse v. O'Reilly*, 6 Penn. L. J. 501; *United States v. Parrott*, 1 McAll. 271. That an injunction may be granted in a proper case to restrain waste, see *Thurston v. Mustin*, 3 Cranch C. Ct. 335.

No. 523.

iv. To Restrain the Use of Plaintiff's Trade-Mark.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore, to wit: in the year 187., at said city and county, the plaintiff invented, manufactured and made an article for the restoring and strengthening of the human hair, to be used upon the head and hair, and gave to said article the name by which it was and is known of hair restorative.

II. That he is now and for a long time has been, and at the time of and before the committing of the grievances hereinafter mentioned, was the manufacturer of said article, which he has for a long time offered for sale, and sold in glass bottles labeled with his own proper labels, devices and trade-marks, and in wrappers or circulars, all of which were composed, invented and adopted by this plaintiff for that purpose, specimens or copies of which labels, devices and trade-marks, and wrappers or circulars are hereto annexed, and form part of this complaint, marked "Exhibit A," and "Exhibit B," the first being a copy of the label and the second a copy of the wrapper or circular.

III. And plaintiff further alleges that by reason of his knowledge and long experience and great care in his said business of manufacturing and making, and the good and useful quality of the said article, the same became and was at and before the time of the grievances hereinafter mentioned, widely known to the community as a valuable and useful article, and acquired a high reputation as such, and commanded and still commands, as a valuable and useful article, an extensive sale at the said City of, and throughout the said State of, which is and for the last years has been a source of great profit to the plaintiff.

IV. That said article is known to the public, and to the buyers and consumers thereof, by the name of hair restorative, and by this plaintiff's own proper devices, trade-marks, labels, and wrappers or circulars.

V. That notwithstanding the long and quiet use and enjoyment by this plaintiff of said name, devices, trade-marks, labels, and wrappers or circulars, the defendant, well knowing the premises, but willfully, wrongfully and unlawfully disregarding the rights of this plaintiff therein, thereafter, to wit, on or about the day of, 187., willfully, wrongfully, unlawfully and fraudulently prepared and offered for sale, and sold, and always has and does still and now offer for sale, and sell, at the said City of, and elsewhere throughout said State of, an article in imitation of the plaintiff's article, which, with intent to deceive and defraud the public, and the buyers and consumers thereof, and to injure and defraud this

plaintiff, they have put up or caused to be put up in similar packages, to wit, in glass bottles, labeled with nearly similar labels, devices and trade-marks, and with nearly similar wrappers or circulars, of which false, and nearly similar labels, devices, trade-marks, and wrappers or circulars, specimens or copies are hereto annexed, and made part of this complaint, marked "Exhibit C," and "Exhibit D," the first being a copy of the spurious label, and the second a copy of the spurious wrapper or circular.

VI. That said last-mentioned and nearly similar labels, devices, trade-marks, and wrappers or circulars, are fraudulent, counterfeit and spurious imitations of the plaintiff's labels, devices, trade-marks, and wrappers or circulars; and that the defendants have, and at all times when selling or preparing any of said imitations of said article have had full knowledge, and are and have been advised and informed, that the said imitated labels, devices, trade-marks, and wrappers or circulars, are and have been pirated or simulated and fraudulent counterfeits of the labels, devices, trade-marks, wrappers and circulars invented, composed and adopted by this plaintiff as aforesaid; all of which will more fully appear by reference to the exhibits hereto annexed and hereinbefore referred to.

VII. That said imitations and counterfeits are calculated to deceive the purchasers and consumers of plaintiff's said article, and the public in general, and actually have misled, and do still and now mislead many of them to buy and purchase the articles offered for sale and sold by the defendants, in the belief that it is the article manufactured by the plaintiff, and greatly to the diminution and damage of the business and profits of this plaintiff.

VIII. And further, the plaintiff alleges that the article so prepared and put up and sold by the defendants, in imitation of the plaintiff's article, is a greatly inferior article, and that by reason of the premises the general esteem and reputation of the said article manufactured by the plaintiff has been injured greatly, to the diminution and damage of the business and profits of this plaintiff.

IX. And further, that the defendants for a long time past have caused, and do still cause an advertisement, a copy of which is hereto annexed, and made a part of this com-

plaint, marked "Exhibit E," to be published in the daily, and various other newspapers published in said City of, and like advertisements in many other newspapers throughout the state of, all of which actings, doings, advertisings and publications are contrary to equity, and greatly injure and damage said plaintiff.

X. And plaintiff further shows that the defendants have shipped and do still ship large quantities of the said imitation so prepared and put up by them, to be carried and offered for sale and sold out of this State, to the great diminution and damage of the business and profits of this plaintiff.

XI. And plaintiff further shows that although before the commencement of this action the plaintiff repeatedly requested the defendants to desist from preparing, making, putting up, offering for sale and selling said imitation, and from simulating, counterfeiting, imitating, and infringing the plaintiff's labels, devices, trade-marks, and wrappers or circulars, and from publishing and causing to be published in the newspapers of this State, or any of them, the advertisement hereinbefore referred to or any similar one, and from shipping any of said imitation, and carrying and offering the same for sale, and selling the same out of this State, yet the defendants have heretofore refused, and do still refuse so to do, but threaten to continue to do as they have heretofore done, and as they are hereinbefore alleged to have done.

XII. That by reason of the premises plaintiff has been injured and sustained damage to the amount of dollars.

XII. And plaintiff further shows that he is without any adequate remedy at law for the grievances, wrongs, injuries and frauds so practiced upon him by the defendant aforesaid, and is entirely remediless without the equitable interposition of the courts.

[*Demand of Judgment.*]

20. *Form.*—This was the complaint in the case of *Fish v. Reddington*, 31 Cal. 187, and is certainly too lengthy for imitation. It is given because it presents nearly all the issues which it is possible for a bill of that character to present.

21. *Action Lies.*—An injunction may be granted to restrain the use of a

trade-mark—*e.g.*, to restrain the publication of a paper under the same name as the paper of the plaintiff: *Am. Grocer Pub. Ass'n v. Grocer Pub. Co.*, 51 How. Pr. 402; see 8 Paige Ch. Rep. 75; also Hop. Rep. 347. To prevent the publication of private correspondence, see 3 Edw. Ch. Rep. 515. To restrain parties from using the name chosen and used by plaintiff for his inn: 3 Sandf. Rep. 725. As to the infringement of trade-mark, see generally: 2 Bosw. 1; 25 Barb. 417; 2 Sandf. 605; 2 Sandf. Ch. 586; Id. 613. For fraudulent change of trade-mark, injunction will be granted: *Gillott v. Kettel*, 3 Duer, 626; *Lemoine v. Ganton*, 2 E. D. Smith, 347. And mere colorable differences will not in general prevent an injunction from issuing: *Williams v. Johnson*, 2 Bosw. 6; *Clark v. Clark*, 25 Barb. 78; *Brooklyn Lead Co. v. Masury*, Id. 418; *A. Co. v. Spear*, 2 Sand. 608. The court will consider whether the public would probably be deceived, rather than whether manufacturers could distinguish, if the article is of such a kind that the public would be apt to purchase upon the strength of the trade-mark: *Shrimpton v. Laight*, 18 Beav. 164.

22. Action will not lie.—An injunction will not be granted to assist a wrong-doer—*e.g.*, to a plaintiff who is himself counterfeiting another man's mark, so as to give him exclusive power to deceive: *Samuel v. Berger*, 4 Abb. Pr. 88; *Partridge v. Menck*, 2 Sand. Ch. 622; 1 How. Cases, 548; *Stewart v. Smithson*, 1 Hilton, 121. Nor in case plaintiff is in anywise imposing by fraudulent statements on the public concerning the matter: 19 How. Pr. 571; 4 Abb. Pr. 144; 6 Beav. 76; *Helmbold v. Helmbold Manf'g Co.*, 53 How. Pr. 453; *Hennesy v. Wheeler*, 51 Id. 457; but see 4 Abb. Pr. 156; and *Comstock v. White* N. Y. Trans., Feb. 17, 1860, *contra*. And where plaintiff falsely stamped his production with the word "patented," an injunction for his protection was refused: *Flavel v. Harrison*, 10 Hare, 471, 472. But in a case where the article had really been patented and the patent had expired, the plaintiff continuing the use of the old label, including the word "patented," this was held justifiable, and no ground for denying an injunction for plaintiff's benefit: 11 Hare, 86. And the plaintiff may even use a fictitious name, and be protected in it: *Steward v. Smithson*, 1 Hilton, 121. If the facts are doubtful, or if the case is for any reason not a clear one, injunction should not be granted before a verdict upon the issues: 18 How. Pr. 69; 4 Abb. Pr. 88; Id. 161; 2 Id. 326; 2 Sand. 618; 2 Philips, 156; 2 Sand. Ch. 628; 39 Eng. L. & E. 514; S. C., 4 Kay & J. 650. But security may be required for an accounting: *Fetidge v. Merchant*, 4 Abb. Pr. 161; *Spothiswood v. Clark*, 2 Philips, 156. The registration of a trade-mark under the act of congress, on articles of a particular kind only, does not enable the person so registering it to restrain another person from using such trade-mark upon another kind of article of the same nature, to which the second person had been in the habit of affixing such trade-mark prior to the registration: *Smith v. Reynolds*, 13 Blatchf. 458.

23. Allegation in Case of a Periodical Publication.—That he is the proprietor and publisher of a newspaper [or magazine, or other periodical] at, known and distinguished as [name of publication]; and that as such proprietor he has published the same daily [or otherwise] for years last past, and that such publication has been made by the plaintiff, and those through whom he purchased the same, as the owners and proprietors thereof, since the original establishment of the same, in the year, under the name of

24. Common Law Rule.—By the common law, the manufacturer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form or device, whereby they may be known in the market as his own, and be distinguished from other like goods, manufactured or sold by other persons; and, when original with him, the owner of such mark will be protected by the courts in its exclusive use, but only so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of any symbols, figures, and combinations of words, which may be interblended with it, indicating their name, kind or quality: *Falkinburg v. Lucy*, 35 Cal. 52.

25. Imitation of Label.—In an action to recover damages for an alleged invasion, by imitation of the plaintiff's trade-mark for the sale of a certain washing-powder, which consisted of a highly colored picture representing a wash-room, with tubs, baskets, clothes lines, etc.; also the following legend interblended on it: "Standard Soap Company, Erasive Washing Powder;" followed by directions for the use of the "washing powder," and the place of manufacture, the alleged imitation by defendants consisted of a picture and label which were the same as in plaintiff's alleged trade-mark only in the use of the words "washing-powder," the direction for the use of the powders, and in use of paper of the same color as that used by plaintiff: *Held*, that this did not constitute an infringement of plaintiff's trade-mark: *Falkinburg v. Lucy*, 35 Cal. 52. The action may be maintained against the vendor of the simulated article, though he sells it as an imitation: *Coats v. Holbrook*, 2 Sandf. Ch. 586. It is sufficient to show the fact of falsity, and that the effect will necessarily be to deceive: *Peterson v. Humphrey*, 4 Abb. Pr. 394. Where a party has a right to the exclusive enjoyment of a trade-mark, it is not necessary for him to show, in order to make out a case for an injunction, that it has been copied in every particular by the defendant. It is enough that the representatives employed bear such resemblance to his as to be calculated to mislead the public generally: *Walton v. Crowley*, 3 Blatchf. 440. But the similarity must be sufficient to amount to a false representation, and calculated to deceive the public generally. When ordinary attention on the part of customers will enable them to discriminate, the courts will not interfere: *Popham v. Cole*, 66 N. Y. 69.

26. Manufacturer.—A manufacturer will be protected in the use of his own name: 19 How. Pr. 14; but see, *contra*, 1 Johns. Eng. 1174.

27. Name, Use of.—And so if defendant's real name be used in such a manner as is likely to mislead and deceive, an injunction will be allowed. Thus, where a hotel had been kept for many years by one Lovejoy, and after his death by other persons using still the name "Lovejoy's Hotel," another Lovejoy opened a hotel under the title "Lovejoy House." He was restrained from so doing. So, where the "Irving Hotel" was opened in opposition to the "Irving House," and where the "Original What Cheer House" was opened in opposition to the "What Cheer House," injunction issued, restraining the use of the titles "Irving" and "What Cheer," respectively: *Woodward v. Lazar*, 21 Cal. 448.

28. Origin, not Quality.—A trade-mark must indicate origin, not quality. So, any words of common use in connection with goods, such as "No. 1," "premium," "best," etc., etc., cannot become exclusive property, under

guise of a trade-mark: *A. Co. v. Spear*, 2 Sandf. 606; and see 17 Barb. 608. But such common words if so put together, in form, color, and appearance, that they are likely to deceive, will be enjoined: *Williams v. Johnson*, 2 Bosw. 9.

29. Owner of Vessel.—The protection of a court of equity, in the matter of injunction, has been extended to the owners of lines of vehicles connected with a hotel: *Stone v. Carlan*, 3 Code Reporter, 68; *Knott v. Morgan*, 2 Keen, 213; 7 Cush. 322; and to hotel-keepers: 3 Sand. 725; 21 Cal. 448, etc., before cited; and to proprietors of places of amusement: *Christy v. Murphy*, 12 How. Pr. 77; and to the proprietor of a dining-saloon whose sign was counterfeited by the owner of a neighboring saloon: N. Y. Trans. Jan. 10, 1861; and to publishers whose publications have been imitated: *Hogg v. Kirby*, 8 Ves. 215; *Bell v. Lock*, 8 Paige, 75; *Snowden v. Noah*, Hopk. 347.

30. Prior Use of Words.—Injunction will not be granted if the words used are such as have been or might reasonably have been used to designate the article before plaintiff adopted them as his: *Wolfe v. Goulard*, 18 How. Pr. 64; 17 Law. & Eq. (Eng.) 257; 3 DeGex, M. & G. 896; *Smith v. Reynolds*, 13 Blatchf. 458.

31. Publication of Advertisement.—No action can be maintained to restrain the publication of advertisements of goods unless it is established that the publication is malicious and for the purpose of injuring the other party; if made to advance the publisher's own sales, and upon a reasonable claim that he has the right which he asserts, the action must fail: *The Celluloid Manfg. Co. v. The Goodyear Dental Vulcanite Co.*, 13 Blatchf. 375.

32. Same Name.—Two manufacturers of the same name must use their names in such a manner as not to deceive the public. Every man has a right to the use of his own name, but he must avoid imitating the mark of another bearing the same name: *Clark v. Clark*, 25 Barb. 79; *Rogers v. Nowill*, 3 De G., M. & G. 614; *Croft v. Day*, 7 Beav. 84; *Taylor v. Taylor*, 23 Eng. L. & Eq. 281; *Sykes v. Sykes*, 3 Barn. & C. 541; 5 Dowl. & Ryl. 292. And the assignee of a trade-mark will be protected under the same rule, either against another person of the same name, or against the assignor himself: 1 Johns. Eng. 174. But the legitimate use, by any man, of his own name cannot be interfered with: 3 DeGex, M. & G. 904; 17 Eng. L. & Eq. 257.

No. 524.

v. *Against Purchaser of Goods, and for Injunction Restraining Sale.*

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale as in Forms No. 106 and 107, Vol. I.]

II. That to induce the plaintiff to make said sale and delivery, and with intent to defraud him of said goods, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth dollars, over and above all his just debts and liabilities, when in truth he was at the time insolvent; and that the plaintiff was induced by

said fraudulent representations, to sell and deliver to the defendant, and so did solely on the faith thereof.

III. That thereafter, and with such intent, defendant removed said goods to, and as the plaintiff is informed and believes, is about to sell and dispose of the same.

IV. That the defendant is insolvent, and, as the plaintiff is informed and believes, a judgment against him will be unavailing and worthless, if he is suffered to sell and dispose of said goods.

Wherefore the plaintiff demands judgment against the defendant, for the sum ofdollars, with interest thereon from the saidday of, 187., and that the defendant and his agents be enjoined from selling, disposing of, removing, or in any wise interfering with, said goods or any of them, until such judgment be fully satisfied.

No. 525.

vi. To Restrain Negotiation of Bill or Note.

[TITLE.]

The plaintiff complains, and alleges:

[Allege making of note, as in Form No. 435.]

III. That the defendant still retains said note in his possession; and though, on theday of, 187., the plaintiff requested him to deliver it up, he refused so to do.

Wherefore the plaintiff demands judgment:

1. That the defendant be enjoined from negotiating, transferring, or enforcing the same.

2. That it be delivered up and canceled.

3. And for the costs of this action.

33. Collection of Note.—Where suit is pending in one court on a note of defendant, though no summons has been served and no appearance made, he cannot bring a bill in equity in another court, to enjoin the collection of the note, or to cancel it, the averment being simply that he has a good defense to the note: *Smith v. Sparrow*, 13 Cal. 596. An injunction will not be granted to restrain the collection of a judgment rendered on a promissory note, for reasons which were known and should have been interposed as a defense in the suit on the note: *Beaudry v. Felch*, 47 Cal. 183. Nor will an injunction be granted to restrain the prosecution of a suit against an indorser where the note has been paid by the maker; as such payment can be set up in defense to the action: *Williams v. Stewart*, 56 Ga. 663; see, also, *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

*No. 526.*vii. *Interpleader.*

[TITLE.]

The plaintiff complains, and alleges:

I. That before the making of the claims hereinafter mentioned, one A. B. deposited with the plaintiff [describe the property] for [safe keeping].

II. That the defendant C. D. claims the same [under an alleged assignment thereof to him from the said A. B.]

III. That the defendant E. F. also claims the same [under an order of the said A. B., transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to, and hereby offers to deposit the same in court, or to deliver the same to such persons as the Court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

Wherefore the plaintiff demands judgment:

1. That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto.

2. That they be required to interplead together concerning their claims to the said property.

[3. That some person be authorized to receive the said property pending such litigation.]

4. That upon delivering the same to such receiver the plaintiff be discharged from all liability to either of the defendants in relation thereto.

5. And that the plaintiff's costs be paid out of the same.

NOTE.—The above form is from Abbotts' Forms, No. 660.

34. By Tenant.—Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case: *McDevitt v. Sullivan*, 8 Cal. 592.

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CHAPTER VI.

SPECIFIC PERFORMANCE.

*No. 527.**i. Purchaser Against Vendor.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant was, on or before the day of, 187., seised and possessed of a certain tract of land, situated in; and bounded and described as follows, to wit: [describe land.]

II. That on said day the plaintiff and said defendant entered into a written contract of lease, whereby said defendant did grant, demise and to farm let said tract of land to this plaintiff for the term of years thereafter, to be fully completed and ended, in consideration of the sum of dollars, monthly rent of said premises, to be paid therefor by the plaintiff to said defendant.

III. That in and by said contract of lease, and as a part thereof, it was further covenanted and agreed that the plaintiff should have the privilege of purchasing said lot or tract of land, on or before the expiration of said lease, for the sum of dollars, in gold coin of the United States, which said covenant or agreement in said lease contained, and as part thereof as aforesaid, is as follows: [insert copy of covenant.]

IV. That the plaintiff, upon the execution and delivery of said lease, entered into and was in the sole possession thereof up to the present time, and is now in possession thereof, and during said time he has made valuable improvements thereon, to wit: of the value of dollars.

V. And the plaintiff further alleges that he duly performed all the conditions of said lease on his part to be performed, and on the day of, 187., which day was previous to the expiration of said lease, the plaintiff tendered to said defendant the sum of dollars, in gold coin of the United States, and demanded from him a conveyance of said premises, and requested him specifically to perform his said covenant or agreement to

convey to him said tract or lot of land, but that he refused and ever since has refused and still refuses so to do.

VI. And plaintiff avers that ever since said tender made as aforesaid, to wit: on the....day of....., 187., he has remained and still is ready and willing to pay to the defendant the said sum of.....dollars in gold coin aforesaid, and now brings the same into this Court for that purpose, and has always been and now is ready and willing to receive a conveyance of said premises.

VII. And plaintiff avers that by reason of the breach of the covenant to convey on the part of the defendant hereinbefore set out, and of his failure to specifically perform the same, plaintiff has suffered damages in the sum of.....dollars.

Wherefore the plaintiff demands judgment:

1. That the said covenant so made between the plaintiff and defendant, hereinbefore set out, may be specifically performed, and that said defendant be adjudged to sell and convey the said premises to the plaintiff, and to execute a good and sufficient deed thereof to him, on payment by the said plaintiff of the amount of the purchase-money aforesaid.

2. That the said defendant be adjudged to account and pay to the plaintiff the damages he has sustained in such event, to wit: the sum of.....dollars, or for such other or further relief as to the Court may seem just.

NOTE.—For the provisions of the California Civil Code on the subject of specific performance, see secs. 3384–3395, and also sec. 3402.

No. 528.

ii. The Same—Short Form.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., the defendant was seised in fee-simple of certain real property, described in the agreement hereinafter mentioned.

II. That on the same day the plaintiff and defendant entered into an agreement under their hands and seals, whereby the plaintiff agreed to buy, and defendant agreed to sell the property described in the agreement, of which the following is a copy: [Copy agreement.]

III. That on the day of, 187., the plaintiff tendered dollars to the defendant, and demanded a conveyance of the said property. [If other conditions were imposed upon plaintiff, aver performance, or offer to perform.]

IV. That the defendant has not executed such conveyance.

V. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

Wherefore plaintiff demands judgment:

1. That the defendant execute to the plaintiff a sufficient conveyance of the said property [following the terms of the agreement].

2. For dollars damages for withholding the same.

1. Adequate Relief—Presumptions.—It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved: Cal. Civ. Code, sec. 3387. A party seeking specific performance of a contract for the sale of personal property must state, in his complaint, the peculiar facts upon which he relies to take his case out of the general rule that such contracts will not be specifically enforced: *Senter v. Davis*, 38 Cal. 450.

2. Award.—Courts of equity may enforce a specific performance of an award respecting real estate: *McNeill v. Magee*, 5 Mas. 244. But specific performance of a mere agreement to submit to arbitration will not be decreed: *Tobey v. County of Bristol*, 3 Story C. Ct. 800. While a court will not decree specific performance of agreement to appoint arbitrators or appraisers to fix the value at which property is to be sold, yet where there has been an acquiescence in the agreement, or such part performance that it would be inequitable not to enforce the execution of such a provision, the court will ascertain what is the fair value: Jerem. Eq. 442; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Kelso v. Kelly*, 1 Daly, 419.

3. Collateral Security.—Specific execution of an agreement to give collateral security may be decreed: 3 Atk. 383; 2 Com. Dig. 340; *Robinson v. Cathcart*, 2 Cranch C. Ct. 590. For the rules applicable to commutative contracts in Louisiana, see *Hyde v. Booraem*, 16 Pet. 169.

4. Conditional Contract.—C. agreed in writing to convey to F. an undivided interest in a mining claim, upon the fulfillment of certain specified conditions to be thereafter performed by F., and let F. into possession. Thereafter, on the failure of C. to convey as stipulated, F., who was at the time out of possession, brought ejectment in the usual form to recover the same: *Held*, that ejectment would not lie, but that the appropriate remedy of F. was by action for specific performance, and as incidental thereto, a delivery of possession: *Felger v. Coward*, 35 Cal. 650. If one who has agreed to convey lands with release of dower is unable to procure a release of dower, the purchaser is entitled to a conveyance without such release of dower, with an abatement

from the purchase-money of the wife's interest at the time of the conveyance: *Davis v. Parker*, 14 All. 94; see *Hawralty v. Warren*, 3 C. E. Green, 124.

5. Conditions Precedent.—An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon performance of the condition: Cal. Civ. Code, sec. 1110. Notice by one party that he will not perform entitles the other to enforce performance without offering to perform on his part: Id. sec. 1440. Impossible and unlawful conditions are void: Id. sec. 1441. Conditions involving a forfeiture must be strictly construed against one for whose benefit it is created: Id. 1442. Where the purchaser covenants to pay the purchase-money, and the vendor covenants to convey at the time of payment, the contract is mutual and dependent, and neither can sue without averring performance, or an offer to perform: *Hill v. Grigsby*, 35 Cal. 656. Where the purchase-money is payable in installments, and the conveyance to be executed on the last day of payment, or on payment of the whole price, or at any previous day, the covenants to pay the sums falling due before the execution of the conveyance are independent covenants: Id. But those falling due after the day for execution of the conveyance are dependent: *Bean v. Atwater*, 4 Conn. 3; 2 Smith's Leading Cases, note to *Cutter v. Powell*, p. 22; *Hill v. Grigsby*, 35 Cal. 656; *Rourke v. McLaughlin*, 38 Cal. 196.

6. Contract must be Certain.—The performance of a contract must be decreed, according to its terms: *Hepburn v. Dunlop*, 1 Wheat. 179; *Bowen v. Waters*, 2 Paine, 1; *Oakley v. Ballard*, Hempst. 475. And specific performance will not be decreed unless the terms of the contract are clear, definite, and positive: *Kendall v. Almy*, 2 Sumn. 278; *Agard v. Valencia*, 39 Cal. 292. Courts of equity will not attempt to enforce vague and shadowy claims: *Doe v. Culverwell*, 35 Id. 291.

7. Contract must be Complete.—Specific performance will not be decreed, if it be doubtful whether an agreement has been concluded, especially if the party has done nothing under it: *Carr v. Duval*, 14 Pet. 77.

8. Contract must be Mutual.—"Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance:" Cal. Civ. Code, sec. 3386. A contract to be obligatory on either party must be mutual and reciprocal: *Doe v. Culverwell*, 35 Cal. 291. Performance will not be decreed, where only a part of the vendors are bound for the title, and there is a want of mutuality: 1 Johns. Ch. 370; *Bronson v. Cahill*, 4 McLean, 19. But the contract becomes mutual by the act of filing the complaint, where the action is brought against the one who signs the memorandum: See 5 N. Y. 246; *Joseph v. Holt*, 37 Cal. 250; *Rogers v. Saunders*, 16 Maine, 92; *Coleman v. Upcot*, 5 Viner, 527; *Owen v. Davies*, 1 Ves. Sr. 82. It is not necessary that the written agreement should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient; the want of mutuality is no objection to its enforcement: 2 Story's Eq. J., sec. 736; 1 Edw. Ch. 1; 16 Wend. 460; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; S. C., 31 How. Pr. 38; *Vassault v. Edwards*, 43 Cal. 458. It is of no consequence if the note or memorandum purports to be in the language of the vendor or the

vendee, or both. If it purports to be in the language of the vendee, it is none the less a note or memorandum stating the names of the parties, and expressing the consideration. By subscribing such a note or memorandum, the vendor vouches for the truth of the facts therein stated, and if need be adopts it as his own: *Joseph v. Holt*, 37 Cal. 250. It thereupon ceases to be the separate statement of the vendee, and becomes the joint act of both: *Id.* An *ex parte* or unilateral statement or proposition will not raise a contract; but such a memorandum is not such a unilateral statement, since it is but a statement of what has already transpired by one party, shown by him expressly, and by the other by implication and assent to; by the latter, by the act of subscribing his name: *Id.* It is a statement as evidence of a contract already made, and not a mere proposition to sell or buy; a mere memorandum to satisfy the statute of frauds, and it is sufficient for that purpose, for it shows a sale and the parties to it, expresses the consideration, and is subscribed by both parties: *Id.* If the language of the note should be, H. has purchased from J., it would include the statement of both a purchase by H. and a sale by J., since the expression, I (H.) have purchased from J., includes the equivalent expression, J. has sold to me (H.): *Id.* "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance:" Cal. Civ. Code, sec. 3388; see, also, *Ballard v. Carr*, 48 Cal. 74.

9. Contract Must be Reasonable.—Specific performance will not be enforced where the contract is unreasonable, or where from surprise it is inequitable to enforce its execution: Cal. Civ. Code, sec. 3391, sub. 2; *Bowen v. Waters*, 2 Paine, 1; *Thompson v. Todd*, 1 Pet. C. Ct. 380; *Surget v. Byers*, Hempst. 715; *Agard v. Valencia*, 39 Cal. 292. Or where the contract is one of great hardship: *King v. Hamilton*, 4 Pet. 311. Mere excess of price over value (*Cathcart v. Robinson*, 5 Pet. 264; 2 Brock. Marsh, 185), or mere inadequacy of price, does not furnish cause for dismissal of the bill: *Erwin v. Parham*, 12 How. U. S. 197. But see Civil Code, sec. 3391, subdiv. 1. In what cases specific performance may be enforced, see *Pennsylvania Coal Co. v. Delaware and Hudson Canal Co.*, 31 N. Y. 91; *Bruck v. Tucker*, 42 Cal. 347.

10. Contract to Release Mortgage.—A party who is entitled to a specific execution of an agreement to release the land from the lien of a mortgage, may maintain a suit for that purpose, notwithstanding before the filing of the bill he had conveyed away the land, such conveyance being with warranty: 4 N. Y. 403; *Bennett v. Abrams*, 41 Barb. 619. An agreement that the holder of a second mortgage, should foreclose his mortgage, and if he should buy at the foreclosure pay a sum on account of the first mortgage, may be enforced: *Livingston v. Painter*, 19 Abb. Pr. 28; 28 How. Pr. 517; 43 Barb. 270; see, also, *McLallen v. Jones*, 20 N. Y. 162.

11. Contract to Transfer Stock.—The agreement to transfer stock may be enforced where the contract to convey is clear, and the uncertain value of the stock renders it difficult to do justice by an award of damages: 2 Barb. 609; 2 Sto. Eq. secs. 716, 718; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300; 31 How. Pr. 38.

12. Contract of Ancestor.—Proceedings may be had to compel a specific performance of a contract of ancestor: *Hyatt v. Seely*, 11 N. Y. 52.

13. Construction of Contracts—Time.—It is impossible to prescribe any general and uniform rule by which the question whether the time within which an act is to be performed is of the essence of the agreement, but each case must be decided upon its own circumstances: *Steele v. Branch*, 40 Cal. 4. The general rule of equity is that time is not of the essence of the contract: *Id.*; see *Grey v. Tubbs*, 43 Id. 359; *Vassault v. Edwards*, Id. 458; *Hearst v. Pujol*, 44 Id. 230; see, also, Cal. Civ. Code, secs. 1490, 1491, 1492 and 1657.

14. Covenant to Renew.—A court of equity can compel the specific performance of an absolute covenant to renew a lease, at a rent to be fixed by arbitrators: *Johnson v. Conger*, 14 Abb. Pr. 195. On a lease from W. to H. was indorsed, "that at the expiration of the said term, H. shall have the privilege of purchasing the whole of said premises," at a fixed price. H. brought a bill demanding a marketable title. W.'s wife refused to join in the conveyance, but no collusion with her husband was shown. Held, that W. was not bound to indemnify H. against wife's claim, and specific performance was refused: *Hawralty v. Warren*, 3 C. E. Green, 124. Where a lease gives the lessee the privilege of purchasing the land on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion: *Hitchcock v. Page*, 14 Cal. 440. See, as to effect of such a covenant, *De Rutte v. Muldrow*, 16 Cal. 505.

15. Demand.—It is held that a reasonable time must be given after a demand to prepare a deed, and by the allegation of a second demand the reasonable time may be shown: *Lutweller v. Linnell*, 12 Barb. 512; *Connelly v. Pierce*, 7 Wend. 130; *Fuller v. Hubbard*, 6 Cow. 17. But if the vendor on the first demand positively refuses, no further demand is necessary: *Carpenter v. Brown*, 6 Barb. 147; *Driggs v. Dwight*, 17 Wend. 74. In an action for the specific performance of a trust, by the execution of a deed, a demand therefor before suit is only material as affecting costs: *Jones v. City of Petaluma*, 36 Cal. 230.

16. Departure from Contract.—Trivial departures from the contract will not affect the right to enforcement of a specific performance: *Secombe v. Steele*, 20 How. U. S. 94.

17. Facts, how Alleged.—A complaint should state expressly, in direct terms, the facts constituting the cause of action, leaving no essential fact in doubt, or to be inferred or deduced by argument from the facts which are stated; and where the memorandum only raises an implication of the terms of the contract, as of the undertaking of the parties, the consideration, etc., and the complaint fails elsewhere to distinctly aver them, it is bad: *Joseph v. Holt*, 37 Cal. 250. Inference, argument or hypothesis cannot be tolerated in a pleading: *Green v. Palmer*, 15 Cal. 411; *Joseph v. Holt*, *supra*. The rule which permits the pleader to declare upon a contract in *hæc verba* is limited to cases where the instrument set forth contains a formal contract: *Joseph v. Holt*, Id. To extend the rule to mere notes or memoranda made as evidences of the terms of a contract sufficient to take it out of the statute of frauds, would be to substitute inference and argument for facts: Id.

18. Fraudulent Conspiracy.—Where there was a fraudulent arrangement and conspiracy between W., the vendor, and B., for the purpose of

depriving the plaintiff of the benefit of his contract: *Held*, 1. That decree for compensation should pass against B., as well as W.; 2. That the declarations of W., tending to implicate B. in the fraudulent transaction, were part of the *res gesta*, and admissible against B. 3. That plaintiff's compensation should be the purchase-money, with interest from the time it was paid: *Powell v. Young*, 45 Md. 494.

19. Grantor to Prepare Deed.—It is the duty of the grantor to prepare, execute and deliver the deed; the grantee need do no more than tender the purchase-money: *Morgan v. Stearns*, 40 Cal. 434.

20. Gold and Silver Coin.—A contract to pay money in gold and silver coin cannot be specially enforced, nor can any other damages be recovered upon its breach, except interest: *Wilson v. Morgan*, 1 Abb. Pr. (N. S.) 174; S. C., 30 How. Pr. 386. So of an award to pay in gold coin: *Howe v. Nickerson*, 14 All. 400; see *Tuffts v. Plymouth Gold Min. Co.*, 14 All. 407. The rule is different in California, if the memorandum provides for payment in gold and silver coin. Where a party who has executed a deed to lands to secure the performance of his agreement, not in writing, as to pay a certain sum of money in gold coin, and who seeks the aid of a court of equity to have the deed declared a mortgage, and to be permitted to redeem and have a conveyance of the land, ought to be held to a full compliance with the terms of the agreement as a condition precedent to the conveyance, and this by no construction of the specific contract act, but by the application of the maxim that "he who seeks equity should do equity:" *Cowing v. Rogers*, 34 Cal. 648.

21. Imposing Terms.—When it would be unconscientious to enforce a specific performance according to the letter, it may be refused, unless the complainant will comply with certain modifications: *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet. 376.

22. Inability to Make Title.—Where the vendor could not make a good title, he cannot enforce the specific performance of the contract by the vendee: *Stevenson v. Buxton*, 15 Abb. Pr. 352; *Morgan v. Morgan*, 2 Wheat. 290; *Watts v. Waddle*, 6 Pet. 389; affirming 1 McLean, 200. And his ability to make title must be unquestionable: *Garnett v. Bacon*, 2 Brock. Marsh. 185. And the title must be to all the lands embraced in the contract: *Hepburn v. Auld*, 5 Cranch, 262; *Sohier v. Williams*, 1 Curtis C. Ct. 479. But where there is simply a deficiency in quantity, a specific performance may be decreed upon the principle of compensation: *Hepburn v. Auld*, 5 Cranch, 262. As to where there is an excess of land, see *King v. Hamilton*, 4 Pet. 311.

23. Jurisdiction.—A bill, *quia timet*, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law. But where the damages resulting from a breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction unless there are some peculiar equitable circumstances: *White v. Fratt*, 13 Cal. 525. The execution of a contract fairly and legally entered into is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform the agreement according to its terms and the manifest intention of the parties: *Hunt v. Ronsmaniere*, 1 Pet. 1. And the jurisdiction having once attached, the court will go on and do complete justice: *Cathcart v. Robinson*, 5 Pet. 264; *Clarke v. White*, 12 Id. 178. But a specific performance of a contract respecting a chattel will not be enforced in equity, unless it clearly appears that there is no adequate remedy at law: *Senter v. Davis*,

38 Cal. 450; *Roundtree v. McLain*, Hempst. 245. Cases in which, and upon what grounds a court of equity will entertain a bill: *Tufts v. Tufts*, 3 Woodb. & M. 456. Specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court: *Rourke v. McLaughlin*, 38 Cal. 196. Jurisdiction depends upon the question whether the breach admits of adequate compensation in damages: *Senter v. Davis*, 38 Id. 450. If non-performance will embarrass the plaintiff in his business plans, or involve him in a loss which a jury cannot estimate with any degree of certainty, specific performance should be decreed: Id.

24. Land Subject to Trust.—The owner of the equity of redemption of land took an assignment of the mortgage to himself, “trustee, and his heirs, and assigns.” After his death defendant agreed to buy the land of his heirs, upon the delivery of a good and sufficient deed, free from all incumbrances: *Held*, that without a discharge of the mortgage, or proof that the land was not subject to a trust, the heirs could not compel specific performance: *Sturtevant v. Jaques*, 14 All. 523.

25. Limitations.—In an action for specific performance, the plaintiff, after a decree in his favor which does not designate the time for performance, may demand its enforcement at any time until the statute of limitations becomes available by his adversary: *Redington v. Chase*, 34 Cal. 666.

26. Liquidation of Damages not a Bar.—“A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same.” Cal. Civ. Code, sec. 3389.

27. Memorandum must be in Writing.—The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, thus recognizing a difference between the contract itself and the written evidence which the statute requires: Chitt. on Cont. 69; *Joseph v. Holt*, 37 Cal. 250. As to what is a sufficient memorandum under the statute, see *Barry v. Coombe*, 1 Pet. 640; *Bissell v. Farmers' and Mechanics' Bank of Mich.*, 5 Id. 495. If the instrument be under the hand and seal of the one who is sought to be charged, equity will treat such agreements as specialties: *Burton v. Smith*, 4 Wash. C. Ct. 522. Specific performance of a parol contract was refused for want of clear, definite, and conclusive proofs of the contract, delivery of peaceful and uninterrupted possession, or valuable improvements made on the premises in question: *Purcell v. Miner*, 4 Wall. 513.

28. Minor Heirs.—Where the vendor dies and the land descends to his heirs, some of whom are minors, the remedy of the purchaser is by applying to the court for an order of specific performance by the minors: *Tompkins v. Hyatt*, 28 N.Y. 347; *Moore v. Burrows*, 34 Barb. 173. A purchaser at an executor's sale of real estate, under an order of court, who has paid the consideration, may compel heirs of deceased to make a title: *Piatt v. McCullough*, 1 McLean, 69.

29. Parol Contract, when Enforceable.—K. entered into a parol contract to convey to L. a tract of land, upon the payment of a stipulated price therefor. L. paid the price as stipulated, and was let into possession. Thereafter K. brought ejectment to recover the possession of said land, to which action L. pleaded said contract, and its said part performance, and prayed

judgment for its complete performance on the part of K.: *Held*, that a judgment for L., as prayed, was properly rendered: *King v. Meyer*, 35 Cal. 646.

30. Parol Promise to Give Land.—A parol promise by the owner of land to give it to another, accompanied by actual possession thereof by him, will be enforced in equity by a decree for specific performance, when the promisee, induced by such promise, has made substantial improvements, and expended considerable money upon the premises, with the knowledge of the promisor: *Patterson v. Copeland*, 52 How. Pr. 460; *Williston v. Williston*, 41 Barb. 635; Id. 619.

31. Performance—Offer of.—An offer of partial performance is of no effect: Cal. Civ. Code, sec. 1486. It must be made in good faith, and in such manner as is most likely to benefit the creditor: Id. sec. 1493. It must be free from conditions which the creditor is not bound to perform: Id. sec. 1494. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer: Id. sec. 1495; and see generally, Id. secs. 1485 to 1515. As to performance, see Id. secs. 1473 to 1479.

32. Pleadings.—A complaint for specific performance need not allege defendant's ability to perform: *Greenfield v. Carlton*, 30 Ark. 547. The complaint must show the contract, including the consideration, date, terms and stipulations: *Gaskins v. Peebles*, 44 Tex. 390.

33. Parties.—Equity may decree a specific performance, as against a party who would not be permitted to demand it himself: *Hepburn v. Dunlop*, 1 Wheat. 179. A vendor may have a decree for the specific performance of a contract as well as a vendee: *Cathcart v. Robinson*, 5 Pet. 264; *Brownson v. Cahill*, 4 McLean, 19. A sub-purchaser may be joined as a party at any time, if the actual posture of the other parties will not be changed: *Taylor v. Longworth*, 14 Pet. 172; see Cal. Civ. Code, sec. 3393. In an action for specific performance to convey an undivided interest of specified quantity of land in a large tract, all persons subject to the plaintiff's equity, and holding adversely to him, must be made parties: *Agard v. Valencia*, 39 Cal. 292.

34. Performance.—For the purpose of enforcing a specific performance of stipulations, the consideration for which was an agreement to perform personal services, an offer to perform these services is not equivalent to an actual performance: *Cooper v. Pena*, 21 Cal. 403.

35. Performance must be Shown.—The complainant must show that he has performed, or offered to perform, on his part, the acts which formed the consideration on his part: *Denniston v. Coquillard*, 5 McLean, 253; *Colson v. Thompson*, 2 Wheat. 336; *Boone v. Missouri Iron Co.*, 17 How. U. S. 340. In Louisiana, neither party can compel the other to perform, unless he complies with the contract *in toto*: *Hyde v. Booraem*, 16 Pet. 170.

36. Performance—Ability of Defendant.—The complaint must show that the defendant has the power or ability to perform on his part, and not leave his capacity in doubt, as the presumptions are always against the pleader, and all doubts are to be resolved against him. Where by the memorandum it appears that notes of third parties, dated two months before, were to be given in payment, but no averment of their existence or of their being in the possession or control of the purchaser at the time appears in the complaint, the defendant could not be decreed to perform, for that would involve an impossibility, since in such an action the plaintiff must make a case in

which the defendant is *prima facie* able to perform: *Joseph v. Holt*, 37 Cal. 250. Where a bill was filed against the provisional committee of a projected railway company, for a specific performance of an agreement to deliver a certain number of certificates, there being no allegation that the defendant could deliver, but a statement from which the contrary might be inferred the bill shows no capacity in the defendants to perform, and demurrer will be sustained: *Columbine v. Chichester*, 2 Phil. 27.

37. Prayer for Relief.—Under a bill which prays for the rescission of a contract specifically, and for general relief, chancery may decree a specific performance, if improper to rescind or modify: *Hepburn v. Dunlop*, 1 Wheat. 179. Case where on refusing to decree a specific performance, the complainant was not entitled to a decree for the sum to be paid on a rescission: *Holt v. Rogers*, 8 Pet. 420.

38. Refusal to Convey must be Alleged.—In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one C., and by agreement with the defendant was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant, upon the demand, refused, or at any other time has refused to execute the deed: *Held*, that the failure to aver refusal is fatal to the action, and may be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action: *Dodge v. Clark*, 17 Cal. 586.

39. Relief.—The specific performance is not a matter of right, but relief rests in the discretion of the court, and a delay of five days, where time may be regarded as of the essence of the contract, may be deemed a bar to a specific performance: *Gale v. Archer*, 42 Barb. 320. And the discretion of the court is governed for the most part by settled rules: *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. 245.

40. Relief, Extent of.—In cases of specific performance, the purchaser is not compellable to accept a conveyance for only a part of the premises, except where they consist of different parcels purchased separately and having distinct prices: 6 Johna. Ch. 38; *Gibert v. Peteler*, 38 Barb. 488. As to the form of relief in a special case where the deed which the vendor had executed became void by his death, and his administratrix was substituted, and it was adjudged that the original plaintiff was entitled to a specific performance, see *Roome v. Phillips*, 27 N. Y. 357.

41. Relief Against Subsequent Purchaser.—“Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or incumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation:” Cal. Civ. Code, sec. 3395.

42. Rents and Profits.—Although the claimant in a bill for the specific execution of a contract may not have specifically claimed in his bill a decree for rents and profits while in the possession of the defendant, he may claim it in the appellate court, under the prayer for general relief: *Watts v. Waddle*, 6 Pet. 389; affirming 1 McLean, 200.

43. Rescinded Contract.—Equity will not compel a specific performance where the parties have, upon default of one party, agreed by parol to rescind the contract: 24 N. Y. 367; *Arnoux v. Homans*, 25 How. Pr. 427.

44. Revision.—"A contract may be first revised and then specifically enforced:" Cal. Civ. Code, sec. 3402; see also *Dewitt v. Duncan*, 46 Cal. 342.

45. Tender.—In suit by a vendee for specific performance of a contract of sale, the averment of tender of payment was in general terms, as that the tender had been repeatedly made, and that the plaintiff has been at all times, and still is, ready and willing to pay: *Held*, that the tender should have been stated with greater particularity as to time, but the objection, in this respect, cannot be taken for the first time in the supreme court: *Duff v. Fisher*, 15 Cal. 375.

46. Tender—Objections to.—"The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards:" Cal. Code C. P., sec. 2076; see also Civil Code, sec. 1501.

47. Time of Performance.—A reasonable time only can be allowed to a vendor to execute his part of the contract: *Bronson v. Cahill*, 4 McLean, 19; *Mason v. Wallace*, Id. 77. The time fixed for conveyance of the land is regarded at law as a material element in it, and if the vendor is not able to perform at the time, the purchaser may elect to consider the contract at an end; but equity will in certain cases carry the agreement into execution, although the time appointed has elapsed: *Bank of Columbia v. Hagner*, 1 Pet. 455. The general rule of equity is that time is not of the essence of the contract: *Brown v. Covillaud*, 6 Cal. 571; *Brashier v. Gratz*, 6 Wheat. 528; *Ahl v. Johnson*, 20 How. U. S. 511; *Hunter v. Town of Marlboro*, 2 Wood. & M. 168; *Wells v. Wells*, 3 Ired. Eq. 596; *Runnels v. Jackson*, 1 How. (Miss.) 358; see Cal. Civ. Code, sec. 1492.

48. Time as the Essence.—Even if there is an express agreement that time shall be of the essence of the contract, yet it is deemed strong, but not conclusive evidence by courts of equity: 2 Pars. on Cont. 543. Except in cases where time has been made the essence of the contract for the sale of property, time is not treated by courts of equity as of the essence of the contract: *Miller v. Steen*, 30 Cal. 407; 7 Ves. jr. 265; 13 Id. 73, 225, 289; 1 Young & Co. 415; *Taylor v. Longworth*, 14 Pet. 175; *Hepburn v. Auld*, 5 Cranch, 262; *Gibbs v. Champion*, 3 Hamm. 336; *De Camp v. Feay*, 5 Serg. & Rawle, 323; *Raymond v. Bernard*, 12 John, 276, where it says there must be something in the contract indicating an intention that default in payment should work a forfeiture, to justify the supposition that time is of the essence of the contract, and it cites the above cases.

49. Time the Essence.—Where time is really material to the parties, the right to a specific performance may depend upon it: *Garnet v. Mason*, 2 Brock. Marsh. 185; *Vint v. King*, 2 Am. Law Reg. 712. To make time the essence of the contract, it must appear that a punctual performance is a condition, which will work forfeiture of the rights given, unless rigorously fulfilled: *Jones v. Robbins*, 29 Maine, 351. Something more than a mere

stipulation that the money shall be paid, or the deed executed at a given time, is required: *Id.*; *Viele v. Troy and Boston R. R. Co.*, 21 Barb. 381; *Jackson v. Ligon*, 3 Leigh, 161, 187.

50. Time, Effect of Delay.—That a court of equity may at any time, as a matter of indulgence, decree a specific performance of an agreement, if the vendor is able to make a good title before the decree is pronounced: *Hepburn v. Dunlop*, 1 Wheat. 179. Where delay has not changed the condition of the parties, nor the value of the property, and the same justice can be done between the parties as when a conveyance was to have been executed, and there is an excuse for delay, a specific execution may be decreed: *Longworth v. Taylor*, 1 McLean, 395, affirmed 14 Pet. 172. So, where the purchaser has entered into possession and improved the land, on payment of the money a specific performance will be decreed, notwithstanding the delay: *Mason v. Wallace*, 4 McLean, 77. And continued possession prevents the purchaser from rescinding the contract on the ground of non-performance on the day named: *Benson v. Tilton*, 24 How. Pr. 494. But possession taken by the purchaser is not a basis for a specific performance, if such possession has been surrendered by him before the commencement of the action: *Haight v. Child*, 34 Barb. 186. "The general principle appears to be perfectly established that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the parties; that it is incumbent on the plaintiff calling for a specific performance to show that he has used due diligence, or if not, that his negligence arose from just cause, has been acquiesced in:" *Chase v. Hogan*, 3 Abb. Pr. (N. S.) 66. The fact that neither party performed nor offered to perform on the day fixed by the contract, and that the purchaser continued in possession some days after, shows that time was not considered by them as of the essence of the contract: *Benson v. Tilton*, 24 How. Pr. 494.

51. Time, when a Bar.—When the circumstances have so changed that the objects of the party against whom a performance is sought can no longer be equitably accomplished by a performance where the lapse of time has been very great, or where the value has materially changed, etc., etc., the court will refuse to interfere: *Green v. Covillaud*, 10 Cal. 328; *Pratt v. Law*, 9 Cranch, 456; *Brashier v. Gratz*, 6 Wheat. 528; *Holt v. Rogers*, 8 Pet. 420; *Cooper v. Brown*, 2 McLean, 495. A purchaser seeking the aid of a court of chancery to enforce specific performance must apply promptly: *McWilliams v. Long*, 32 Barb. 194. When the vendor gives notice to the vendee, by serving him with a summons in ejectment, it is the vendee's duty to act promptly, by tendering payment and asserting his claim to the performance of the contract, or his equity will be lost: *Tibbs v. Morris*, 44 Barb. 138. Case where the court refused to interfere after a lapse of seven years: *Pratt v. Carroll*, 8 Cranch, 471. Specific performance was refused where there were laches in the non-performance of the agreement: *Boone v. Missouri Iron Co.*, 17 How. U. S. 340. So of an award where there had been a long delay and laches, and a material change of circumstances, and injury to the other party: *McNeil v. Magee*, 5 Mas. 244.

52. Title.—In a suit for specific performance, a purchaser will be forced to take a title which appears to the court of appeals to be good, though the judge of the court below was of a different opinion; that fact not being sufficient to constitute a doubtful title: *Beioley v. Carter*, Law Rep. 4 Ch. 230. An agree-

ment to make "a good and sufficient general warranty deed" of lands is an agreement to convey a good title to such lands: *Wellman v. Dismukes*, 42 Mo. 101. "An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt:" Cal. Civ. Code, sec. 3394. If the vendor cannot perform the entire agreement, and can convey an undivided half of the land, he may be compelled to convey that interest: *Marshall v. Caldwell*, 41 Cal. 611.

53. Valid Tender of Purchase-money.—To constitute a valid tender, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party on the performance by him of the requisite condition: *Englander v. Rogers*, 41 Cal. 420. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to an actual production and tender of the money, instrument or property: Cal. Code C. P., sec. 2074. An offer of performance must be free from any conditions which the creditor is not bound on his part to perform: Cal. Civ. Code, sec. 1494.

54. Vendor and Vendees as Trustees.—The rule is well settled that where land is purchased, for which one party pays the consideration, and another party takes the title, a resulting trust immediately arises in favor of the person paying the consideration, and the other party becomes his trustee, and it is now equally well settled that if one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*. The party setting up the trust must show that the money was paid by him at or before the execution of the conveyance: *Case v. Coddington*, 38 Cal. 193; 2 Story Eq., sec. 1201; Will. Eq. 600; *Botsford v. Burr*, 2 Johns. Ch. 405. The general principle is that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased. Courts of equity treat such contracts precisely as if they had been specifically executed. The vendee is treated in equity as the equitable owner of the land, and the vendor as the owner of the money: *Willis v. Wozencraft*, 22 Cal. 616. The distinction between an action for specific performance and an action to enforce a trust considered in reference to the effect of delay: *Tomlinson v. Miller*, 3 Keyes, 517.

55. Verbal Contract to Give Lease.—If the owner of land makes a verbal agreement with another to lease him the same for one year, with the privilege of two years more, at an annual rent of six hundred dollars, and a lease is to be executed containing the usual covenants, and the lessee takes possession and pays the rent for the first year, the agreement is sufficiently certain to support a decree against the lessor for a specific performance: *Clark v. Clark*, 49 Cal. 586.

56. What Contract may be Enforced.—A court of equity will decree a good and sufficient conveyance to be made upon payment of the purchase-money, pursuant to a contract for the sale and conveyance of land: *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 299; *Murphy v. McVicker*, 4 McLean, 252. But this jurisdiction of equity must be exercised under a sound dis-

cretion, with an eye to the substantial justice of the case: *King v. Hamilton*, 4 Pet. 311. And the relation of vendor and purchaser must exist between the parties: *Watson v. Coulson*, 1 McLean, 120. A vendee who has fulfilled his contract may obtain a decree for specific performance against parties who with notice of his equities succeeded to the interest of the vendor: *Laverty v. Moore*, 33 N. Y. 658. The rules preventing the adjudgment of a specific performance of a contract in cases of fraud must state surprise and hardship—reviewed: *Lynch v. Bischoff*, 15 Abb. Pr. 357. A gift of land, having been partly executed, may be enforced by an action for specific performance: *Freeman v. Freeman*, 51 Barb. 306. Lands held by no other tenure than possession, may be the legitimate subjects of control, and sometimes in equity chattel interests or personal property are made the subject of specific performance: *Johnson v. Rickett*, 5 Cal. 218; *Senter v. Davis*, 38 Cal. 450.

57. What cannot be specifically enforced.—"The following obligations cannot be specifically enforced: 1. An obligation to render personal service; 2. An obligation to employ another in personal service; 3. An agreement to submit a controversy to arbitration; 4. An agreement to perform an act which the party has not power lawfully to perform when required to do so; 5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or, 6. An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable:" Cal. Civ. Code, sec. 3390. Where any change of circumstances in regard to the property makes it unconscionable that the party should have execution of the contract, a court of equity will withhold its aid: *Iglehart v. Vail*, 73 Ill. 63; *Thurston v. Arnold*, 43 Iowa, 41. An agreement in settlement of a family dispute will not be enforced, unless the agreement is complete and final: *Wistar's Appeal*, 80 Pa. St. 484. Nor where there is a substantial defect with respect to the nature, character, situation, extent, or quality of the estate, which was unknown to the purchaser, and in regard to which he was not put upon inquiry: *Ellicott v. White*, 43 Md. 145. Nor when performance is obviously impossible: *So held*, where one had already mortgaged his land contracted to convey it free of incumbrances, and the purchaser prayed specific performance, but would not waive the objection to the mortgage: *Snell v. Mitchell*, 65 Me. 48. Nor the performance of continuous duties which involve personal labor and care; as the running of street cars along a particular street daily "at such regular intervals as may be right and proper," whether the obligation of the railroad company rest on contract or the provisions of its charter: *McCann v. South etc. R. R. Co.*, 2 Tenn. Ch. 773. The remedy in such case is by mandamus, or by proceedings, in the name of the State, for a forfeiture of the charter: *Id.*

58. What parties cannot be compelled to perform.—"Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable; 3. If his assent was obtained by the misrepresentations, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or, 4. If his assent was given under the influence of mistake, misapprehension or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may

be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced:" Cal. Civ. Code, sec. 3391.

59. Who can not have Specific Performance. — "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default:" Cal. Civ. Code, sec. 3392; see, also, *Howard v. Throckmorton*, 48 Cal. 482; and Cal. Civ. Code, sec. 1492.

60. When Action can be Maintained.—The Cal. Civil Code provides that except as otherwise provided in the article relating thereto, the specific performance of an obligation may be compelled: Sec. 3384. Specific performance will be decreed whenever the parties or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court. Thus, specific performance of a contract for lands lying in America was decreed in England: *Penn v. Lord Baltimore*, 1 Ves. Sr. 444. So, a trust in relation to lands lying in Ireland may be enforced in England, if the trustee live in England: 1 Vern. 419. It will lie if the subject of the trust or contract be within the jurisdiction, though the parties are not. So, a bill for an allowance for the support of children out of stocks in England was sustained, though the parties were out of the kingdom: *Anonymous*, 1 Atkyns, 19. So, also, in the case of a contract for the sale of lands lying in America, made by a citizen of New York, at Havana, with the defendant, a Spanish subject, jurisdiction was upheld in New York: *Ward v. Arredondo*, Hopkins Ch. R. 213; see, also, *Arglass v. Muschamp*, 1 Vern. 75; *Toller v. Cateret*, 2 Id. 494; *Gardner v. Ogden*, 22 N. Y. 327; *Newton v. Bronson*, 3 Kiernan, 587; cited in *Rourke v. McLaughlin*, 38 Cal. 196.

No. 529.

iii. *The Same—Where Money Lay Idle.*

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the day of, 187., at, was the owner in fee of the premises hereinafter described, and that he then entered into an agreement with the plaintiff, executed under their hands and seals, whereby plaintiff agreed to buy and defendant agreed to sell the property described therein; of which agreement the following is a copy: [copy the agreement.]

II. That the plaintiff has duly performed all the conditions of said agreement on his part.

III. That on the day of, 187., at, the plaintiff tendered to defendant said sum of dollars, and requested a conveyance of said premises according to the terms of said agreement; but the defendant then

and ever since has refused to execute and deliver such conveyance.

IV. That the plaintiff, ever since the time of said tender, has kept said money so tendered on deposit and unproductive, and ready to be paid over on said agreement, and into this Court.

Wherefore plaintiff demands judgment:

1. That the defendant execute to the plaintiff a sufficient conveyance of the said property.

2. For dollars damages for withholding the same.

3. For interest on plaintiff's purchase-money which has lain idle from the date when said conveyance should have been made.

61. Allegation where there is a Deficiency of Land.—That since the making of said agreement, the plaintiff has discovered that there is a deficiency in the quantity of said, and that the same does not contain acres, but only acres. Wherefore the plaintiff demands judgment: 1. That a just deduction from the purchase-money be made on account of said deficiency, and that on payment of the residue of said purchase-money, the defendant execute to the plaintiff a sufficient conveyance of the said property; 2. For dollars damages for withholding the same.

62. Allegation where there is an Outstanding Incumbrance.—That the defendant's title to the premises is incumbered by a mortgage to one A. B. for dollars, with interest [terms of payment], which mortgage is not payable until the day of, 187., wherefore, etc.

63. Discretion.—The court may exercise its discretion in fixing the time from which interest shall run on the purchase-money: *Buchannon v. Upshaw*, 1 How. U. S. 56; S. C., 17 Pet. 70.

64. Mistake in Boundaries.—An error in boundaries may be alleged in this allegation: *Vorhees v. De Meyer*, 2 Barb. 37; see, also, *Whitw. Eq. Prec.* 225.

No. 530.

iv. On an Exchange of Property.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the day of, 187., at, the plaintiff and defendant entered into an agreement in writing, dated on that day, whereby, in consideration of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the day of, 187., convey to the plaintiff in fee a lot of land, situated in the Town of, County

of, in the State of, and described as follows: [Description of premises.] In consideration whereof, the plaintiff covenanted in and by said agreement to convey to the defendant in fee a house and lot situate in the City of San Francisco, in this State [describe it].

II. That the plaintiff performed all the conditions of said contract on his part, and on the day of 187., at, tendered to the defendant a warranty deed of said premises, signed and sealed by the plaintiff, and demanded of him a deed of said premises in, but the defendant refused to execute and deliver such a deed to the plaintiff.

III. That on the day of, 187., in pursuance of said agreement, the plaintiff delivered and the defendant took possession of the premises so to be conveyed to the defendant, and that he still occupies the same.

Wherefore the plaintiff demands judgment:

That the defendant convey to the plaintiff said lot in, pursuant to the contract, and for the costs of this action.

65. Consideration.—A consideration must be shown, as voluntary covenants are not specifically enforced: *Hayes v. Kershaw*, 1 Sandf. Ch. 258.

66. Exchange of Lands.—A contract for the exchange of lands is as much within the statute of frauds, as a contract for their sale: *Purcell v. Miner*, 4 Wall. U. S. 513.

67. Essential Allegations.—What must be shown in such a complaint, and which require to be proved, are: First, The contract must be shown, bearing no *jus deliberandi*, nor *locus penitentiae*; Second, That the consideration has been tendered; Third, That there has been such a part performance that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law; Fourth, That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party.

No. 531.

v. Vendor against Purchaser.

[TITLE.]

The plaintiff complains and alleges:

I. That on the day of, 187., the plaintiff was seised in fee of certain property hereinafter described.

II. That on the same day the plaintiff and defendant entered into an agreement, under their hands and seals, whereby plaintiff agreed to sell, and defendant agreed to

buy the land described in said agreement, a copy of which is hereto annexed, and made a part of this complaint, marked "Exhibit A."

III. That on the . . . day of, 187 . . . , at, the plaintiff tendered to the defendant a deed of the premises, pursuant to the agreement, but the defendant then, and ever since, refused to accept the same, and to pay the amount of purchase-money specified in the said agreement [or otherwise, according to the terms of sale].

IV. That the plaintiff was, and has always been, and still is ready and willing to perform the agreement on his part.

Wherefore the plaintiff demands judgment:

I. That the defendant perform said agreement, and pay to the plaintiff dollars, the remainder of said purchase-money, with interest from the . . . day of, 187 . . .

[Annex "Exhibit A."]

68. Agreement.—That the plaintiff executed the agreement is not essential: *Clason v. Bailey*, 14 Johns. 484; *Worrall v. Munn*, 5 N.Y. 229.

69. Damages.—The existence of an adequate remedy by action for damages does not preclude the vendor of lands from suing for specific performance: *Fry on Sp. P.* 11; 2 Comst. 60; *Schroeppel v. Hopper*, 40 Barb. 425; see, also, *Duff v. Fisher*, 15 Cal. 375.

70. Debt, Purchase of.—A bill in equity, which states as the complainant's title, that he purchased under regular proceedings, and at an open and fair execution sale, a debt of \$260,000 for \$600, is not bad on demurrer: *Erwin v. Parham*, 12 How. U. S. 197.

71. Employment.—Where the defendant employed the plaintiff to negotiate a sale of certain described lands, and find a purchaser for the same, with a stipulation that if the said plaintiff should within ten days find a purchaser at a certain price per acre, that the defendant would sell and convey the same to such purchaser, and that plaintiff should have for his services all that should be obtained from such purchaser over said price per acre, it is not a contract for sale of land within the meaning of the statute of frauds, but is a mere contract of employment: *Heyn v. Phillips*, 37 Cal. 529. And is revocable at any time: *Brown v. Pforr*, 38 Cal. 550. But it would seem that where a portion of the remuneration to be paid for such services, should be a part of the land in question, it would be otherwise. In that case, the contract being oral, and no note or memorandum having been reduced to writing or signed by either party thereto, that portion stipulating for the transfer of land to the plaintiff is null and void by the eighth section of the statute concerning fraudulent conveyances, and that portion of the contract being void, the remaining portion could not be enforced: *Lexington v. Clark*, 2 Ventr. 223; *Craicford v. Morrill*, 8 John. 255; cited in *Fuller v. Reed*, 38 Cal. 99.

72. Part Performance.—A court will, under some circumstances, decree

a specific performance, where there has been a part performance: *Brashier v. Gratz*, 6 Wheat. 528. The payment of part of the price, is not such an act as that the rescission of the contract would be a fraud on the other party: Story's Eq., secs. 760, 761; Sudg. on Vend. 112, sec. 3; Exp. Storer, Davies, 294; *Haight v. Child*, 34 Barb. 186; *Purcell v. Miner*, 4 Wall. U. S. 513.

73. Plaintiff's Title.—If the plaintiff's title is defective, and it appears before decree or report, that it can be perfected, the delay is compensated by charging the complainant with interest: *Clute v. Robinson*, 2 Johns. 595; *Pierce v. Nichols*, 1 Paige, 244; *Reformed Dutch Church v. Mott*, 7 Id. 77; *Viele v. Troy and Boston R. R. Co.*, 21 Barb. 381; affirmed, 20 N. Y. 184; *Cleveland v. Burrill*, 25 Barb. 532.

74. Remedy.—Whether equity will enforce the specific performance of a contract, depends not upon the character of the property involved, as whether it be real or personal but upon the inadequate remedy afforded by a recovery of damages in an action of law: *Duff v. Fisher*, 15 Cal. 375.

75. Sale and Delivery of Chattel.—W. agreed orally to buy of G. a designated machine, worth \$375, and directed G. to forward the same, by the New York Central Railroad to one S.: *Held*, that the sale was complete, and taken out of the statute of frauds, by delivery to said railroad company. Specific performance decreed in favor of the vendors: *Glen v. Whitaker*, 51 Barb. 451.

76. Variance.—If there be a variance between the written agreement and the true agreement, the difference should be clearly shown: *Coles v. Browne*, 10 Paige, 526.

CHAPTER VII.

USURPATION OF OFFICE.

No. 532.

i. By the People, etc., on the Complaint of a Private Party.

<p>THE PEOPLE OF THE STATE OF CALIFORNIA, on the Complaint of A. B., Plaintiffs.</p>
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<p style="text-align: center;"><i>against</i> C. D., Defendant.</p>

The People of the State of California, by E. F., their Attorney-general, upon the information and complaint of said A. B., complain of the said defendant, and allege:

I. That on the day of, 187., at, an election was duly held in the [Precinct, District, or County] of this State, for the office of [here designate the office], for the term of years, from the day of, 187..

II. That at the said election one received the greatest number of legal votes for the said office.

III. That on the day of, 187., the defendant usurped the said office, and has ever since withheld the same from the said

Wherefore the plaintiff demands judgment:

1. That the defendant is not entitled to the said office, and that he be ousted therefrom.

2. That the said is entitled to said office, and that he be put in possession of the same.

NOTE.—For mode of proceeding to contest elections, see Cal. Code, C. P., secs. 1111 to 1127. And for proceedings to remove civil officers for violation of official duties, see Stats. of Cal. 1873-4, p. 911; Hitt. Codes and Stats. par. 10810.

1. **Action in General.**—Actions for the usurpation of any office, franchise or liberty, or on the part of a corporation for the usurpation of a franchise not authorized by law, are brought by the attorney-general: 5 Mass. 230. He may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto: Cal. Code C. P., sec. 804. It is a remedy provided by the code: *People v. Olds*, 3 Cal. 175. Though the distinction between writs of mandate and *quo warranto* are still recognized: *Id.* 177. It is the proper remedy to try the right to an office: *People v. Scannell*, 7 Cal. 439. The contestant in a proceeding to contest an election cannot take judgment by default; the allegations must be proved: *Keller v. Chapman*, 34 Cal. 635; *Searcy v. Grow*, 15 Cal. 117; *Dorsey v. Barry*, 24 Cal. 449. Where a city charter provides that the common council shall judge of the qualifications, elections and returns of their own members, the council possesses exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into those matters: *People v. Mettler*, 47 Cal. 524. Where a failure to qualify works a forfeiture of the office, *quo warranto* is the ancient and appropriate, and usually the exclusive method of judicially ascertaining the fact and ejecting an unlawful incumbent: *Hyde v. The State*, 52 Miss. 665.

2. **Appointment to Office.**—Under the provisions of the constitution, two events must coincide before the governor is authorized to appoint to an office. There must be both a vacancy, and no mode provided by the constitution and laws for filling "such vacancy:" *People v. Mizner*, 7 Cal. 523; *People v. Stratton*, 28 Cal. 392; *The People ex rel. Shoaff v. Parker*, 37 Cal. 639. The constitutional provision only steps in where no other appointing power is provided; and it has been repeatedly held that the constitutional provision conferring power on the governor in the cases specified, should be strictly construed when there is any doubt, so as to limit the power of the governor: *The People ex rel. Shoaff v. Parker*, 37 Cal. 649. When an office becomes vacant and is filled by appointment, the term of the officer appointed continues until the next election by the people, authorized by law: *People v. Mathewson*, 47 Cal. 442.

3. **Arkansas.**—The writ of *quo warranto* lies against a corporation for the abuse of its charter: *Smith v. State*, 21 Ark. 294.

4. Averment of Date of Incorporation.—A complaint in *quo warranto* against a plank-road company must aver time of incorporation or date of organization, that the Court may know by what statute the decision is to be governed: *Covington Co. v. Van Sickle*, 18 Ind. 244.

5. Damages.—Damages sustained by reason of the usurpation may be recovered by action: Cal Code C. P., sec. 807.

6. De Facto Officer.—To constitute a person a *de facto* officer as distinguished from a usurper, he should have been put into the office and have secured the holding thereof in such manner as to be considered in peaceable possession, and actually exercising the functions of an officer; an intrusion by force is not sufficient: *State ex rel. Corey v. Curtis*, 9 Nev. 325; see, also, *Braid v. Theritt*, 17 Kan. 468, and *State v. Carroll*, 38 Conn. 449. An appointment of the clerk of a court by a *de facto* judge is good, as against an appointment made by the judge *de jure*, even after the judge *de facto* has been ousted and the judge *de jure* installed under judicial decision: *People v. Staton*, 73 N. C. 546.

7. Determination of Rights.—In such actions the Court may not only determine the right of the defendant, but of the relator also; and if it determine in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office: *People v. Banvard*, 27 Cal. 470.

8. District Attorney.—A person not licensed to practice law by any court is eligible to the office of District Attorney, in California: *People v. Dorsey*, 32 Cal. 296.

9. Duly and Legally Held.—“That an election was duly and legally held pursuant to the statute,” was held sufficient as to the time, and that it was on the day prescribed by law: *People v. Ryder*, 2 Kern. 433.

10. Essential Averments.—The complaint should state the facts constituting the usurpation, which constitute the cause of action: *State v. Messmore*, 14 Wis. 115. An averment that the defendants “are and have been for some time past unlawfully holding and exercising the offices” in controversy, specifying particular acts, “when in fact they had and have no lawful right or title to hold or exercise the said offices,” is a sufficient allegation that they have usurped the offices: *State v. Price*, 50 Ala. 568. If the relator claims title in himself, his averments of title, if defective or insufficient on their face, are liable to demurrer; but the sustaining of such demurrer does not affect the judgment which ought to be rendered against the defendant if the averments as to his usurpation are sustained: *Id.*

11. Holding Office.—To constitute the “holding” of an office, there must be the concurrence of two wills—that of the appointing power, and that of the person appointed: *People ex rel. Meloney v. Whitman*, 10 Cal. 38.

12. Holding Two Offices.—For discussion on the meaning of the third article of the Constitution, and a review of the discussions upon the point involved from the earliest case of *Burgoyne v. Supervisors*, 5 Cal. 9, see the leading case of *People v. Provines*, 34 Cal. 521.

13. Illinois.—In Illinois, a proceeding by *quo warranto* is a criminal prosecution, and should be carried on “in the name and by the authority of the people of the State of Illinois,” and should conclude “against the peace and dignity of the same:” 11 Ill. 552; 13 Id. 66; 15 Id. 417; see Puterbaugh’s Pl. &

Pr. 669. When it is resorted to for the protection of individual rights, it is in substance, though not in form, a civil suit, and a change of venue will be allowed under the statute, the same as in civil cases: 13 Id. 581. And it should be alleged that the party against whom it is filed holds and executes some office or franchise, describing it: 21 Id. 65. It is the proper mode of testing the question of forfeiture of a charter: 1 Gilm. 667; 32 Ill. 82. Leave to file an information is not granted as a matter of course; it rests in the sound discretion of the court. The court or judge may grant leave, or may enter an order on the defendants to show cause why an information should not be filed: *People v. Moore*, 73 Ill. 132. The fact that the relator took part in an election of the officers complained against is a fatal objection to the application on his part for leave to file an information charging them with unlawfully acting as such: Id.

14. Intruder.—A person holding a certificate of election without legal title to the office is an intruder: *People v. Jones*, 20 Cal. 50. And the action lies against an intruder into the office created by the charter of a corporation: *People v. Kipp*, 4 Cow. 382; *People v. Tibbitts*, Id 358.

15. Louisiana.—In Louisiana, the writ of *quo warranto* will not be granted to test the right to a state office: *Terry v. Stauffer*, 17 La. An. 306.

16. Massachusetts.—The proceeding in *quo warranto* is applied to testing the right to the use of lands below low water mark: *Commonwealth v. Roxbury*, 9 Gray (Mass.), 451. In Massachusetts, the action lies for the purpose of dissolving a corporation, or seizing its franchises: *Commonwealth v. Union Insurance Co.*, 5 Mass. 230; in cases of usurpation by individuals of offices holden of the commonwealth: *Commonwealth v. Fowler*, 10 Mass. 295; against an officer appointed by the governor and council, viz., a judge of probate, as well as those holding corporate offices or franchises: *Commonwealth v. Fowler*, 10 Mass. 290. So of the right of persons exercising the functions of parish officers *in colori officii*: *Sudbury v. Stearns*, 21 Pick. 155. Against a corporation, for a forfeiture of their charter: *Commonwealth v. Tenth Mass. Turnpike Co.*, 5 Cush. 509. Or a violation of their charter: 11 Cush. 171. It does not lie against the managers of a lottery appointed by a corporation having the grant of such lottery: *Commonwealth v. Dearborn*, 15 Mass. 125. Nor against a railroad company, in behalf of a stockholder, merely because the corporation issued stock below the par value, and began to construct their road before the requisite amount of stock was subscribed, if the petitioner's private interest was not put in hazard: *Hastings v. Amherst and Belchertown R. R.*, 9 Cush. 596. The information must be filed by the attorney-general: *Goddard v. Smithett*, 3 Gray 116; *Commonwealth v. Union Fire and Marine Ins. Co.*, 5 Mass. 230; or the solicitor-general: Id.

17. Michigan.—Where the information averred that an election to fill the offices was held, and the relator duly elected, a plea was held to be good which set forth that no votes were cast to fill such office. As to its exercise in the dissolution of insolvent corporations, see *People v. Bank of Pontiac*, 12 Mich. 527. The court will not dismiss an information in the nature of a *quo warranto* on motion of the relator whose name was used without his authority, but will amend the information by striking out the relator's name: *People v. Knight*, 13 Mich. 230. Judgment of ouster will be given on default: *People v. Connor*, 13 Id. 238. If the defendant does not disclaim he must justify; and his justification must show all the facts necessary to establish his

lawful right to hold the office; and this affirmative showing he has the burden of maintaining: *Larke v. Crawford*, 28 Mich. 88.

18. **Missouri.**—A writ of *quo warranto* is in the nature of a writ of right for the state, against any person who claims or exercises any office, to inquire by what authority he supports his claim, and it issues as a matter of course: *State v. Perpet. Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Mo. 555. Leave of court must first be obtained before the information can be filed, as the relation of a private person, but otherwise when the attorney-general files the information *ex officio*. The jurisdiction of the supreme court being appellate it refused to issue the writ: *State v. Stewart*, 32 Mo. 379. It is a civil proceeding: *State v. Lingo*, 26 Mo. 496. The sheriff of the old county may proceed against the person assuming to act as sheriff of the new county, when the act establishing the new county within the borders of the old county is unconstitutional: *State v. Scott*, 17 Mo. 521. Where an office is already filled by a person holding by color of right, *quo warranto* is the proper remedy: *St. Louis Co. Court v. Sparks*, 10 Mo. 117. A recorder who has failed to take and file the oath prescribed by the new constitution may be removed upon an information in the nature of a *quo warranto*: *State v. Bernondy*, 36 Mo. 279. In a suit against a defaulter, the petition should show that the person, when appointed to the second office, was in default, and accountable for public moneys: *Ex parte Bellows*, 1 Mo. 115. Neither in this state nor under the statute of Anne is the relator necessarily a claimant for the office alleged to be usurped; nor is the relator's title necessarily examined into, except so far as it may incidentally or indirectly affect the right of the defendant; nor can the qualifications of electors be inquired into upon an information in the nature of *quo warranto*: *State v. Vail*, 53 Mo. 97; *State v. Townsley*, 56 Id. 107.

19. **New York.**—In New York, an action in the nature of a *quo warranto* is a civil action: *People v. Cook*, 8 N. Y. 67; affirming S. C., 14 Barb. 259. It may be maintained to establish title to a public office: *People ex rel. Smith v. Pease*, 27 N. Y. 45. In such action it may be shown that a sufficient number of the votes cast for a person who received the certificate were illegal, to annul his majority, and his election may be set aside for that reason: *Id.* Such action lies against a corporation, of which a receiver was appointed on account of its insolvency, to vacate its charter and prohibit it from acting: *People ex rel. Barton v. Rensselaer Ins. Co.*, 38 Barb. 323; *People v. Washington Ice Co.*, 18 Abb. Pr. 382. It lies against a corporation for carrying on banking business without authority, this being a franchise given by statute: *People v. Utica Ins. Co.*, 15 Johna. 358. So is the possession of corporate powers: *People v. Tibbets*, 4 Cow. 384. So is the appointment of professors of an incorporated college: *People v. Trustees of Geneva College*, 5 Wend. 211. The object of the code is to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within the state, and it necessarily involves a determination of the existence of the particular office: *People v. Carpenter*, 24 N. Y. 86. An action cannot be maintained by an individual either as corporator or tax-payer to determine the legality of the election of one claiming to hold a municipal office, unless plaintiff is thereby affected in his private rights, as distinct from other corporators. The remedy is by appropriate proceedings in the name of the people of the state: *Demarest v. Wickham*, 63 N. Y. 320. Nor can an action be maintained by an individual claiming to hold a municipal office, to determine

his right thereto, when it does not appear that any person claims the right thereto in hostility to him, or that his legal rights as officer have been interfered with by the defendant: *Id.* The burden is on the defendant of showing that he has a legal title to the office before he can have judgment in his favor; but a failure to do so on his part does not establish the title of the relator. Upon that issue plaintiffs have the affirmative and the burden of proof is on them: *People v. Thacher*, 55 N. Y. 525. The evidence of voters is proper, and they may be required to testify for whom they voted: *Id.*

20. North Carolina.—An information in the nature of a writ of *quo warranto* against a corporation, to have its privileges declared forfeited because of neglect and abuse in their exercises, must be brought in the name of the attorney-general and cannot be instituted in the name of a solicitor of a judicial district: *Houston v. Neuse River Co.*, 8 Jones, 476.

21. Ohio.—On a judgment of ouster in *quo warranto*, against an incumbent in office, the court will not proceed to adjudge in favor of another claimant whose election is then in process of regular contest: *State v. Taylor*, 15 Ohio St. 137.

22. Parties.—A certificate of election is not necessary to enable a party claiming to have been elected to bring this suit: *Magee v. Board of Supervisors of Calaveras Co.*, 10 Cal. 376. Where several claim an office, their rights may be determined in a single action: Cal. Code C. P. sec., 808.

23. Pennsylvania.—Jurisdiction in *quo warranto* is exercised by the supreme court, and the state has power to inquire into the exercise of the right of corporations reserving the right of trial by jury in such cases: *Commonwealth v. Delaware and Hudson Canal Co.*, 43 Penn. St. R. (7 Wright) 295. The supreme court will grant the writ to try the right of a member of the common council to a seat in that body: *Commonwealth v. Meeser*, 44 Penn. St. R. (8 Wright) 341. The writ may issue against a public officer for bribery, fraud or any willful violation of the election law without a preliminary conviction for the offense; and the question whether the offense was committed may be tried in the proceedings under the writ of *quo warranto*: *Commonwealth v. Walter*, 83 Pa. St. 105.

24. Possession.—An allegation that defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation. If the complaint be defective in this particular, the defect must be reached by special demurrer: *People v. Woodbury*, 14 Cal. 43.

25. Salary of Office.—The salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise. Principle affirmed in *Dorsey v. Smith*, 28 Cal. 21; *Stratton v. Oulton*, *Id.* 44. And a party elected and qualified, and being ready and willing to enter upon the discharge of the duties of the office, his right to the salary is unaffected by the fact that a usurper discharged the duties of the office: *Dorsey v. Smith*, 28 Cal. 21; cited in *Carroll v. Seibenthaler*, 37 Cal. 193.

26. Surrender of Office Property.—In an action by one claiming to have been elected to an office, against his predecessor, to compel a surrender of the books and papers belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it: *Doane v. Scannell*, 7 Cal. 393; *Id.* 439.

27. Title of Relator.—In pleading a party's title to public office, an averment that under and in pursuance of the laws of this state, on a specified day, he was duly appointed to fill such office, and duly made and executed his official bond with sureties, and took the oath of office required by law, and was thereby constituted such officer, and was thenceforth entitled to hold and administer such office, is sufficient on demurrer: *Platt v. Stout*, 14 Abb. Pr. 178. But the complaint need not aver his requisite qualifications for the office: *People ex rel. Crane v. Ryder*, 12 N. Y. 433.

28. United States Territories.—A proceeding in the nature of a *quo warranto* in one of the territories of the United States, to test the right of a person to exercise the functions of a judge of the supreme court of the territory, must be in the name of the United States, and not in the name of the territory: *Territory v. Lockwood*, 3 Wall. 236. The proper practice in such such cases, in *quo warranto*, stated: *United States v. Lockwood*, Burn. (Wis.) 215.

29. Unnecessary Averments.—It need not be stated that the claimant possessed the requisite qualifications, nor that he has taken the oath and given bond of office, nor need it state the number of votes given: *People ex rel. Crane v. Ryder*, 12 N. Y. 433; S. C., 16 Barb. 370. As the complaint may be good against the defendants without showing title in the relator: *Flynn v. Abbott*, 16 Cal. 358; *People v. Ryder*, 16 Barb. 370.

30. Vacancy.—Vacancy in office is defined in the constitution: *People v. Whitman*, 10 Cal. 38. When the constitution enumerates the events that constitute a vacancy, all other causes of vacancy are excluded, except when this construction leads to an injurious result: *Id.*; *Brooks v. Maloney*, 15 Cal. 58. As to when a vacancy occurs in an office, see *People ex rel. Shoaff v. Parker*, 37 Cal. 639; citing and commenting on various cases, and also *People ex rel. Baird v. Tilton*, *Id.* 614; likewise citing many cases and commenting thereon. In the states of Pennsylvania and Missouri, it has been held that a vacancy does not occur, but the incumbent of the expired term holds over: *Commonwealth v. Hanley*, 9 Penn. St. 513; *State v. Lush*, 18 Mo. 333. If an office, filled by appointment of the governor, requires the confirmation of the senate, such a vacancy therein as will authorize the governor to fill the same without the consent of the senate, can be caused only by the death or resignation of the incumbent, or by the happening of some other event, by reason of which the duties of the office are no longer discharged. The expiration of the term of the incumbent simply, if he continues to discharge the duties of the office, does not create such a vacancy as authorizes the governor to appoint without the action of the senate: *People v. Bissell*, 49 Cal. 407.

31. When Action Lies.—For usurpation of, intrusion into, or unlawful holding any public office, civil or military; this action will lie: *People v. Olds*, 3 Cal. 167; *Lewis v. Oliver*, 4 Abb. Pr. 121; *People v. Sampson*, 25 Barb. 254. Or to try the title to office: *People v. Scannell*, 7 Cal. 432; *Mayor of N. Y. v. Conover*, 5 Abb. Pr. 171. Or to test the right of an appointee of the board of pilot commissioners: *People ex rel. Palmer v. Woodbury*, 14 Cal. 43. Or against one in possession of an office to which he has not been duly elected, but who holds a certificate from the board of election canvassers: *People v. Jones*, 20 Cal. 50. The possession of the certificate affords him, at most, but a color of title, and does not invest him with the right which belongs to an-

other: *Id.* It is only *prima facie* evidence of title to the office, and not conclusive: *Magee v. Board of Supervisors*, 10 Cal. 376. It is competent to go behind the certificate in such proceedings, as the issuance of a commission is a mere ministerial act: *Conger v. Gilmer*, 32 Cal. 75; *People v. Seaman*, 5 Den. 409.

32. Wisconsin.—In Wisconsin, the writ and the substituted proceeding by information, in the nature of *quo warranto*, are abrogated by statute, and a civil action lies in their place: *State v. Messmore*, 14 Wis. 115.

No. 533.

ii. The Same—Against an Appointed Officer, for Holding Over.

[TITLE AND COMMENCEMENT, AS IN LAST FORM.]

I. That on the . . . day of . . . , 187 . . . , at . . . , the defendant was duly appointed . . . , by the Supervisors of said City, and immediately thereafter entered upon the duties of the said office, and continued therein until his removal as herein stated.

II. That on the . . . day of . . . , 187 . . . , the defendant was duly removed from the said office by the Supervisors of said City.

III. That immediately after the removal of the defendant as aforesaid, one A. B. was duly appointed . . . , by the Supervisors of the City, to fill the vacancy made by the removal of the said defendant as aforesaid.

IV. That the said A. B. thereupon accepted the said office, and in the form and within the time required by law and the ordinances of the said City, took and subscribed before the Mayor of the said City, and filed in his office, the oath of office of the said A. B., as such . . . , and also executed and filed in the office of the . . . of the said City, an official bond, with sufficient sureties, approved by the said . . . , in the amount prescribed by the ordinances of the said City.

V. That the said A. B., after the filing of such official oath and bond, demanded of the said defendant the possession of the said office, which the said defendant refused; and he still continues to usurp, hold, and exercise the said office, to the exclusion of the said A. B.

Wherefore the plaintiff demands judgment:

1. That the defendant is not entitled to the said office, and that he be ousted and excluded therefrom.

2. That the plaintiff is entitled to the said office, and that

he be admitted into the same, and to all the rights and emoluments thereof.

33. Arrest.—That defendant may in such actions be arrested, see Cal. Code C. P., sec. 804.

No. 534.

ii. *To Dissolve a Corporation for Exercising Franchise not Conferred by Law.*
[TITLE AND COMMENCEMENT AS IN FORM NO. 532.]

I. [Aver incorporation of defendants, as in form No. 51, vol. I., p. 226.]

II. That said corporation, for the space of months past, has exercised, without any warrant, charter, or grant, the franchise [insert user], and has [recite its acts in this usurpation of franchise], and has exercised franchises not conferred upon it by law.

Wherefore the plaintiff demands judgment:

1. That the defendant [naming the corporation], be excluded from all corporate rights, privileges, and franchises.

2. That the said corporation be dissolved.

3. And for costs of this action.

34. Note.—As to the rules of pleading in such cases, see Cal. Code C. P., secs. 802 to 810, for involuntary dissolution, and secs. 1227 to 1233, same code, for voluntary dissolution; see also Cal. Civ. Code, secs. 399 to 403. The due incorporation of a company, claiming to act as such in good faith, cannot be inquired into in a collateral proceeding by a private party; but such inquiry may be had at the suit of the state, on information of the attorney-general: Cal. Civ. Code, sec. 358; see also *People v. Ravenswood, etc., Turnpike and Bridge Co.*, 20 Barb. 518; *People v. Utica Ins. Co.*, 15 Johns. 358; *People v. Richardson*, 4 Cow. 97. The proceeding must be against the corporation itself, not merely against the individual members: *The State v. Taylor*, 25 O. St. 279; *State v. Barron*, 57 N. H. 498.

COMPLAINTS—SUBDIVISION NINTH.

Statutory Actions.

CHAPTER I.

FOR FORCIBLE ENTRY AND UNLAWFUL DETAINER.

No. 535.

i. For Forcible Entry.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned he was in the peaceable and actual possession of all that certain piece or parcel of land [describe the premises], and of the dwelling-house, barns, and sheds thereon.

II. That on the....day of....., 187., and while the plaintiff was so in possession of said land and premises, the defendant, with violence and a strong hand, and by force, entered thereon, and in a forcible manner ejected said plaintiff, and put him out of said lands and tenements, and broke the doors and windows of said house, and tore down and destroyed said barn and sheds [set out the facts showing a forcible entry], contrary to the form of the statute, and to the damage of the plaintiff.....dollars.

III. That the said defendant unlawfully withholds and keeps possession of said land and premises, and has so held and kept possession of the same at all times since the saidday of.... ..., 187..

IV. That in consequence of said acts the plaintiff has been deprived of the rents, issues, and profits of said land and premises, to his damage.....dollars.

[Demand of Judgment.]

NOTE.—Under the second clause of section 1159 Cal. Code C. P., the allegation in par. II. may be as follows:

II. That afterward, to wit: on the....day of....., 187., and while the plaintiff was so in possession of said land and premises, the defendant peaceably entered thereon, and afterwards and on the same day, forcibly turned out and expelled the plaintiff therefrom [or if the eviction was by threats and

menacing conduct, state the facts in regard thereto], contrary to the form of the statute, and to the damage of the plaintiff.....dollars.

1. Action—Character of.—The action is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Question of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple, title, and present right of possession is shown to be in the defendant: *McCauley v. Weller*, 12 Cal. 500. At common law, a person holding the title to land and having a present right of entry might use actual force in entering, if necessary for overcoming any forcible resistance, because his right of entry being perfect, no other person could lawfully resist him in the exercise of his perfect right. The English statutes of forcible entry and detainer declared that an entry with actual force should subject the party so entering to an indictment for any consequential breach of the peace, and to restitution of possession, and also to an action of trespass. But these statutes have always been so construed as not to affect the common law right of justifying, in an action of trespass *quare clausum fregit*, the forcible entry, by pleading and proving a right of entry, and hence *liberum tenementum* has, notwithstanding those statutes, been always held to be an effectual plea to the action of trespass, and thus proves that the right of entry is the right to make an actual entry on the land: Robertson, C. J., in 7 J. J. Marsh. 601. The statutes against forcible entry and detainer are not aimed against the right of entry nor even against the entry where the right to enter exists, but against an entry, irrespective of the right, under circumstances specially named or described in the statute. The right of entry could not be taken away by statute, though it is entirely competent for the legislature, in the interest of peace and good order, to prohibit its exercise in such manner as would involve a breach of the peace or the wrongful injury or destruction of property. The injury to the public through an improper exercise of this important right may directly affect but one person, yet it is a wrong to the public, just as a crime committed against the person of A. is yet an offense against the commonwealth. Upon no other theory can any valid statute be framed which shall take away from me a right, or hinder its exercise, any more than I can be deprived of my property by the mere force of legislative enactment. The other branch of the statute, that in relation to unlawful detainer, is merely a summary mode of recovering possession by action from a tenant of real property. It will be observed that under the California statute there is no such thing as an "unlawful entry" except as constituting under certain circumstances, a "forcible detainer." This action is not intended as a substitute for the action of ejectment: *Hodgkins v. Jordon*, 29 Cal. 577; *Owens v. Doty*, 27 Id. 502. The purpose of the action is to obtain a restitution of the premises and damages occasioned by the forcible entry and detainer, but when damages are claimed which do not necessarily result from the forcible entry or detainer, the title to the property injured may be a proper subject of inquiry, as in other actions for the same injury: *Warburton v. Doble*, 38 Id. 619.

2. Actual Possession.—The complaint must show that the plaintiff was

in the actual, and not merely in the constructive possession or occupancy of the premises within five days preceding the entry; but that does not require an actual residence or bodily presence: *Shelby v. Houston*, 38 Cal. 410; *Wilson v. Shackelford*, 41 Id. 630; *Leroux v. Murdock*, 51 Id. 541. Nor is cultivation necessary, nor improvement, as contradistinguished from the erection of substantial fences or barriers marking the line of the premises over which control is asserted. The erection of a substantial fence and planting of ornamental trees around a city lot amount to actual possession: *Gray v. Collins*, 42 Cal. 152. And a natural barrier, as a precipitous cliff or the shore of a deep stream or the ocean may serve as a part of the inclosure: *Conroy v. Duane*, 45 Cal. 597. Neither a good and substantial fence nor a residence upon premises is necessary to a peaceable and actual possession. There may be an actual possession without fences or inclosure of any kind: *Goodrich v. Van Landigham*, 46 Cal. 601. A scrambling possession or one obtained by force or fraud, and maintained for a time by threats or violence is insufficient: *Bowers v. Cherokee Bob*, 45 Cal. 495; *Conroy v. Duane*, Id. 597; *Voll v. Butler*, 49 Id. 74. A lease of premises containing a provision that the lessor may during the term occupy all or any part of the premises, does not prevent the lessor from maintaining forcible entry against a stranger, if the lessor continues to occupy notwithstanding the lease; and he may prove such occupation on the trial: *Bowers v. Cherokee Bob*, *supra*. One who has simply worked on a mining claim for prospecting purposes, but has ceased work, and has not occupied the same for several months, cannot maintain forcible detainer against one who enters thereon and refuses to deliver possession on demand: *Laird v. Waterford*, 50 Cal. 315.

3. Allegation Construed.—The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges that he is in possession in one place, and in another avers that he is not, shows no cause of action: *Dickinson v. Maguire*, 9 Cal. 46. If the plaintiff sues upon one only, or upon two of the causes of action mentioned in the forcible entry and detainer act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the court, on its own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony: *Valencia v. Couch*, 32 Cal. 340. As to when complaint may be amended, see Cal. Code C. P., sec. 1173. A complaint in forcible entry and detainer in two counts, the first of which alleges the possession of the plaintiff, and the unlawful entry of defendant, without alleging a withholding of any character, or a demand of possession or refusal, or the use of any force or menace; and in the second count shows that the defendant, being in the possession, plaintiff demanded that he surrender possession, which defendant refused to do, but still detains them by force, etc., is bad on demurrer, as neither count in itself states a cause of action: *Barlow v. Burns*, 40 Cal. 351.

4. Arrest of Defendant.—If the complaint presented establishes, to the satisfaction of the judge, fraud, force or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant: Cal. Code C. P., sec. 1168. See, in connection with this section, article 1, section 15, of the Constitution of California.

5. Circumstances of Terror.—Where the defendant entered with a large number of men, in a hurried manner, a little after daylight, upon land in the

possession of the plaintiff, although the latter had no house upon it, and the defendant's party tore down one fence and erected another and put up a shanty hurriedly and in a rough manner, all of which was completed by eleven o'clock in the forenoon of the day on which the entry was made, and the completion of the job was celebrated by the firing of a pistol: *Held*, that there were sufficient "circumstances of terror" to make the entry a forcible one: *Gray v. Collins*, 42 Cal. 152.

6. Construction of Statute.—Each mode mentioned in the statute is as distinct and complete in itself as that of the expulsion of the party in possession by force, threats, or menace, after a peaceable entry: *Brawley v. Risdon Iron Works*, 38 Cal. 676. It is not intended by the statute to charge a party with responsibility for a forcible detainer, by construction, who did not in fact detain the premises: *Brawley v. Risdon, etc.*, Id. The fraudulent acts which may be alleged under the fifth section (Cal. Code C. P., sec. 1166) do not constitute a cause of action, but merely go to the enhancement of damages, when a cause of action is made out under the other sections of the act: *Polack v. Shafer*, 46 Cal. 270. If the defendant enters in good faith under claim and color of title, his entry is not unlawful within the meaning of the act: *Dennis v. Wood*, 48 Cal. 361. The Code of Civil Procedure (Cal.) provides for the entire field of forcible entry and detainer, and repeals all prior statutes on that subject: *Hemstreet v. Wassum*, 49 Id. 273.

7. Costs.—Costs should not be adjudged to be paid in gold coin: *More v. Del Valle*, 28 Cal. 170.

8. Damages.—The right to the rents and profits comes from the right to the possession of the premises. But if the plaintiff claims the value of the buildings destroyed as damages, the solution of the question would depend upon the amount of his interest in the building: *Wharburton v. Doble*, 38 Cal. 619. And damages are not awarded unless the plaintiff recovers possession of the premises in controversy: *Brawley v. Risdon Iron Works*, Id. 676. A., in pursuance of the provisions of the "act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," entered upon unoccupied land, and marked it out, so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B.: *Held*, that in an action of forcible entry A. could recover the land from B., but without a fine or treble damages: *Stark v. Barnes*, 4 Cal. 412. The complaint in an action of forcible entry need not pray for treble damages to warrant the court in trebling them: *Hart v. Moon*, 6 Cal. 161. If a complaint contains proper averments of damages sustained, and plaintiff recovers, and damages are found, either by the court or by the verdict of a jury, it is the duty of the court to treble the damages, although treble damages are not asked for in the complaint: *Tewksbury v. O'Connell*, 25 Cal. 264; *Watson v. Whitney*, 23 Cal. 375. Under the former statute it was held that, if the court refused to treble the damages, the error, if such it were, could be corrected on appeal without ordering a new trial, and that mandamus would not be granted: *Early v. Mannix*, 15 Cal. 149; see Cal. Code C. P., secs. 1166 and 1174. Where the proofs show that plaintiff was only ousted from a part of the premises he cannot recover damages for the detention of the whole: *Thompson v. Smith*, 28 Cal. 527.

9. Description of the Land.—In forcible entry and detainer, a description of the land, sufficiently definite to enable the administration of sub-

stantial justice, is all that is required in actions before justices of the peace: *Hernandez v. Simon*, 4 Cal. 182. Where the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land bounded and described as follows, to wit:" [and then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres] "the said ten rods square being situated, etc.—the proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract: *Held*, that the variance in the description of the premises did not prejudice appellant; the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises: *Paul v. Silver*, 16 Cal. 73; see *Green v. Palmer*, 15 Id. 411. "That tract or parcel of land situated in the county of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican nation to Don Carlos Antonio Carillo, by grant dated November 29, 1833, and bounded and described as follows: bounded by the Missions San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues, a little more or less," is a sufficient description: *More v. Del Valle*, 28 Cal. 170. In an action brought in M. county the land was described as "south of O. river," whereas the county lay north of it. But enough was recited elsewhere in the complaint to identify the land with property shown to be situated in M. county: *Held*, that the description was sufficient for the purpose of the action, and the words "south of O. river" might be rejected as surplusage: *Silvey v. Summer*, 61 Mo. 253.

10. Entry in Good Faith.—If the defendant enters in good faith, under claim and color of title, his entry is not unlawful: *Dennis v. Wood*, 48 Cal. 363; *Shelby v. Houston*, 38 Id. 422. A peaceable entry made in bad faith is an unlawful entry: Id. The defendant may introduce evidence of title in himself for the purpose of showing good faith in his entry, but not for the purpose of establishing or trying title: *Dennis v. Wood*, *supra*. And if he does so the plaintiff cannot introduce evidence of title in himself in rebuttal: Id. But he may introduce a prior deed of the grantor to another person: *Conroy v. Duane*, 45 Cal. 597. A qualified pre-emptioner who enters upon public surveyed land, peaceably and in good faith, for the purpose of pre-empting, and believing that he has a right to enter, cannot be removed by this proceeding: *Townsend v. Little*, 45 Cal. 673. But see *Randall v. Falkner*, 41 Id. 242. Defendant may show that prior to the time plaintiff acquired possession, he had exercised acts of ownership over the property as going to the question of good faith in his entry: *Conroy v. Duane*, 45 Cal. 597; see also, *Bowers v. Cherokee Bob*, Id. 495.

11. Force Essential.—Force, either actually applied or justly to be feared from the conduct of the defendant, is essential to the support of this action: *Frazier v. Hanlon*, 5 Cal. 156. To sustain an action of forcible entry, or forcible and unlawful detainer, actual force, threats of violence in the entry, or the just apprehension of violence to the person, must be shown to have existed, unless the detainer be riotous: Id. But see *Brawley v. Risdon Iron Works*, 38 Cal. 676.

12. Forcible Entry Defined.—"Every person is guilty of a forcible

entry who either: 1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or, 2. Who, after entering peaceably upon real property, turns out, by force, threats or menacing conduct, the party in possession:" Cal. Code C. P., sec. 1159. All former acts on this subject were repealed by the Code on the first January, 1873: *Hemstreet v. Wassum*, 49 Cal. 273. The act of 1866 (Stats. 1865-6, p. 768), used the following language: "If any person shall, with violence and a strong hand, enter upon or into any lands or buildings, either by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, or if any person after entering peaceably, shall turn out by force, or by threats, or by menacing conduct, the party in possession, such person shall," etc. Under this statute it was held: That an entry "by breaking open doors, windows, or other parts of a house," is declared by the statute to be a forcible entry; and so also is an entry which is effected by "any kind of violence or circumstance of terror" directed toward the person in possession. Each of these modes is as distinct and as complete in itself as the third mode mentioned in the section—that of expulsion of the party in possession by force, threats, or menace after a peaceable entry: *Brawley v. Risdon Iron Works*, 38 Cal. 677. The court in this case, under a statute almost identical with the present, makes a clear distinction between a forcible entry into a house and a forcible entry into other real estate. In the former case the breaking open doors, windows, or other parts of a house, is, of itself, a forcible entry, while in all other cases there must be some kind of violence or circumstance of terror directed toward the person in possession. The punctuation in the latter clause is the same in both acts. Terror is a state or condition of the mind. The obvious conclusion is, that in order to constitute a forcible entry upon lands as distinguished from houses, some person or persons must be present to be terrified by the violence or other circumstances of terror. If no one is present, the entry is a mere trespass: *Frasier v. Hanlon*, 5 Cal. 156. If there is no right of entry, and if followed by demand of possession by the plaintiff, and a refusal to surrender it by the defendant, it constitutes a forcible detainer under subdivision 2 of sec. 1160, of the Cal. Code C. P., which is the same as sec. 3 of the act of 1866, and prior to which time there was no similar statute.

13. Forcible Entry and Detainer—Who Liable.—One who, with armed men, enters upon land inclosed with a fence, and in the possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of forcible entry and detainer: *Watson v. Whitney*, 23 Cal. 375. Several persons were owners of separate tracts of land within an outside fence which formed a common inclosure; but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract. A. and B., two of these owners, disposed of their tract to C. Soon after this D., who was the owner of another tract within the inclosure, went upon the tract sold to C. and commenced plowing. C. went to D., took hold of his horses, and commenced turning them from the tract, when D. drew a pistol and aiming it at him, threatened to hurt him if he did not leave. D. continued plowing the land. *Held*, that the acts committed by D. clearly amounted to a forcible entry and detainer, and that the general outside fence constituted as full and complete an actual possession in

the owner of each separate tract as though it had been inclosed by a lawful fence: *Hussey v. McDermott*, 23 Cal. 413.

14. Gist of the Action.—A complaint in an action under the forcible entry and detainer act, other than actions against tenants holding over as provided in said act, does not state facts sufficient to constitute a cause of action, unless it allege a forcible entry or a forcible detainer: *McEvoy v. Igo*, 27 Cal. 375. If the complaint charges a forcible entry with a multitude of people, and a forcible and unlawful detainer, the forcible entry is the gist of the action: *McMinn v. Bliss*, 31 Id. 122.

15. Injunction.—Where parties threaten to take forcible possession of property, and the complaint does not aver the insolvency of the defendants, and that there is no adequate remedy at law, an injunction will not be granted. Where forcible possession is taken, forcible entry and detainer would be a speedy mode of regaining possession, and for other damages, the usual proceedings at law would suffice: *Tomlinson v. Rubio*, 16 Cal. 201. Injunction will not be granted to restrain the execution of a judgment, in forcible entry and detainer, against a husband, for land claimed by the wife as her separate estate, upon the ground that she was not made a party to the forcible entry suit, or that she was a sole trader: *Saunders v. Webber*, 39 Cal. 287.

16. Jurisdiction.—The county court of the county in which the property, or some part of it, is situated, has jurisdiction: Cal. Code C. P., sec. 1163, and Civ. Code, sec. 85, subd. 2. And for the purpose of hearing and determining actions of forcible entry and detainer the county court is always open and in session: Id., sec. 89.

17. Parties Plaintiff.—The remedy is a summary one, given by statute to protect the possession, and cannot be extended by implication to any other than the real occupants: *Treat v. Stuart*, 5 Cal. 113. A landlord cannot sue in this form, in his own name, for an unlawful entry upon the possession of his tenant: Id. It can only be maintained by the person ousted; and his grantee cannot maintain the action: *House v. Keiser*, 8 Cal. 499. A tenant in common cannot maintain an action of forcible entry and detainer against his co-tenant for holding over. The land must first be partitioned: *Lick v. O'Donnell*, 3 Cal. 59. But under the former statute it was held that one or more tenants in common might maintain the action as against third persons, without joining his co-tenants: *Bowers v. Cherokee Bob*, 45 Cal. 495. See, however, Cal. Code C. P., secs. 1165 and 381. Where a lessor reserves the right to occupy all or any part of the leased premises during the term, and does continue to occupy, notwithstanding the lease, he may maintain the action: *Bowers v. Cherokee Bob*, *supra*. But where a hotel and adjoining grounds are leased, and the lessee inserts a covenant that the lessor may retain and occupy a single room in the hotel and board there, the lessor cannot maintain forcible entry, even as to the room so occupied by him: *Polack v. Shafer*, 46 Cal. 270. One in possession of property simply as the agent of another, cannot maintain the action in his own name: *Mitchell v. Davis*, 20 Cal. 45. But a tenant at will may: *Jones v. Shay*, 50 Cal. 508. A landlord in possession of land by his tenants is not an "occupant" under sub. 2, sec. 1160, Cal. Code C. P., concerning forcible detainer, and therefore cannot maintain an action under that subdivision: *Hammel v. Zobelein*, 51 Cal. 532. If, after the execution of a lease, the lessor enters into such a partnership with the lessee as to destroy

the lease, the former cannot maintain this action against the latter, who has become his partner: *Pico v. Cuyas*, 47 Cal. 180; 48 Id. 639.

18. Parties Defendant.—An action of forcible entry and detainer will not lie against a party claiming a right to land, who is not in the actual possession: *Preston v. Kehoe*, 10 Cal. 445. A person may be guilty of a forcible entry who is not actually present, and does not actively assist therein. He is guilty of an entry made with force by one acting at the time under his direction and procurement: *Minturn v. Burr*, 20 Cal. 48. An action under the act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ: *Janson v. Brooks*, 29 Cal. 214; see Cal. Code C. P., sec. 1164. The action may be brought against husband and wife, notwithstanding the wife is a sole trader: *Howard v. Valentine*, 20 Cal. 282; see, also, 39 Id. 287; and Cal. Code C. P., secs. 370, 371. One who goes upon the land several weeks after the alleged ouster, simply as an employee of the persons who ousted the plaintiff, is not guilty of an unlawful entry and forcible detainer: *Conroy v. Duane*, 45 Cal. 597. One who peaceably enters upon a mining claim which has been prospected by another, but abandoned for several months, is not guilty of a forcible detainer simply for refusing to surrender possession on demand: *Laird v. Waterford*, 50 Id. 315.

19. Possession.—One entering within the inclosure of another, and building a house there, and asserting a claim to the inclosed land, while the other is living within the inclosure and asserting his possession to the land, does not acquire such an actual possession as to enable him to maintain the action, unless it is to the land on which his house actually stands, and so much as is absolutely necessary to the occupation of the house: *Ross v. Roadhouse*, 36 Cal. 580. See, as to actual possession by inclosure under the Van Ness Ordinance, *Satterlee v. Bliss*, 36 Cal. 487.

20. Possession Essential.—In actions of forcible entry and detainer, the fact of possession, and not the right of possession, is what is to be determined: *Mitchell v. Davis*, 20 Cal. 45. The plaintiff must show an actual, peaceable and exclusive possession in him; a scrambling or interrupted possession is not sufficient: *Id.*; *House v. Keiser*, 8 Cal. 499. The plaintiff must have been in actual possession; and when the land is public land, not taken up under our Possessory Act, nor under the federal laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient: *Preston v. Kehoe*, 15 Cal. 315. One who in the morning enters upon a portion of a tract of land in the possession of another, and incloses it with a fence, and puts a house on it before sundown, does not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor, who at sundown destroys the same house and fence and drives him away: *Hoag v. Pierce*, 28 Cal. 187.

21. Possession, Right to Protect.—One who is in possession of a tract of land has the right to resist and expel an intruder, if the resistance and expulsion take place before the possession of the intruder had become actual and peaceable: *Hoag v. Pierce*, 28 Cal. 187. The law will not permit a party to take forcible possession even of his own lands, if they are in the peaceable

though wrongful possession of another; and if he does so he will not only be compelled to restore the possession before his title will be investigated, but will also be punished by fine and further judgment for treble damages for his own infraction of the laws: *Mitchell v. Davis*, 23 Cal. 381.

22. Possession Sufficient.—A person has possession of a lot twenty-eight feet by one hundred and thirty-two, sufficient to enable him to maintain forcible entry and detainer, if it adjoins a lot upon which he lives, and he has a stable on it, and cultivates it, even though the fence inclosing the whole is not very substantial: *Valencia v. Couch*, 32 Cal. 340.

23. Possession, Averment of.—The objection to a complaint in forcible entry and detainer, that it does not aver "actual possession," the word "possession" only being used, was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended; but it cannot be urged in the Supreme Court for the first time: *Minturn v. Burr*, 16 Cal. 107. It is an essential averment in the complaint, in an action of forcible entry and unlawful detainer, that at the time of the alleged forcible entry plaintiff was in the actual possession of the premises; and in order to maintain the action, plaintiff must prove this averment on the trial: *Cummins v. Scott*, 23 Cal. 526. If the complaint in forcible entry and detainer sufficiently shows an actual peaceable possession in plaintiff, it will be sufficient without the use of the word "actual;" but it is better to use the statutory term: *Moore v. Del Valle*, 28 Cal. 170. An averment of title in forcible entry and detainer may be treated as surplusage: *Id.*

24. Principal and Agent.—Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third person, whether the agent had any written authority or not: *Minturn v. Burr*, 16 Cal. 107. In an action between S. and D., a writ of restitution issued commanding the sheriff to cause D. to be removed from certain premises, and S. to have restitution of the same. The return of the writ by the sheriff shows that he "put S., by his representative M., in peaceable possession:" *Held*, that the possession under the writ was that of S., and not of M.; that M. was the mere agent of S., and that the presumption of the continuance of that relation was not destroyed by proofs of acts of control over the premises subsequently exercised by M. which were not inconsistent with his position as agent: *Mitchell v. Davis*, 20 Cal. 45. After the service of the writ, and while the relation remained unchanged between S. and M., D. entered upon the premises, and an action under the forcible entry and unlawful detainer statute was thereupon commenced by and in the name of M. against D.: *Held*, that M. could not maintain the action by reason of his want of possession: *Id.* The persons by whose direction, agency and procurement the forcible entry is made, are liable in the action: *Minturn v. Burr*, 20 Cal. 48.

25. Proceedings.—The complaint must contain a statement of the facts on which the plaintiff seeks to recover, together with a reasonably certain description of the premises; and the plaintiff may also set forth therein any circumstances of fraud, force or violence which may have accompanied the

alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor. If the unlawful detainer charged be after default in the payment of rent, the amount of such rent must be stated: Cal. Code C. P., sec. 1166, as amended 1878. On filing the complaint the clerk issues a summons returnable at a day designated therein, not less than three nor more than twelve days from its date, except when publication of the summons is necessary; in which the return day must be fixed by the court or the judge thereof: Id. The summons must be served at least two days before the return day; but if not served, the plaintiff may have an alias summons. For the form and service of the summons, see Id. sec. 1167. If the complaint presented establishes, to the satisfaction of the judge, fraud, force or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant: Id. 1168. If the defendant does not appear the court must enter his default, and render judgment for the plaintiff as prayed for in the complaint: Id. sec. 1169. The defendant may answer or demur on or before the day fixed for his appearance: Id. sec. 1170. Whenever an issue of fact is presented it must be tried by a jury, unless such jury is waived: Id. sec. 1171. Upon the trial, if it appears from the evidence that the defendant has been guilty of a forcible entry or forcible detainer other than the offense charged in the complaint, the judge must order the complaint to be forthwith amended to conform to the proofs. Such amendment is not ground for continuance unless the defendant by affidavit shows good cause therefor: Id. 1173. As to verdict and judgment, see Id. sec. 1174. An appeal taken by the defendant does not stay proceedings upon the judgment unless the county judge so directs: Id. sec. 1176. The provisions of Part II of the Code C. P., relative to new trials and appeals apply in these proceedings, except so far as they are inconsistent with these special provisions: Id. sec. 1178. As to relief of tenant against forfeiture of lease, see Id. sec. 1179.

26. Rents and Profits.—The plaintiff in an action in unlawful detainer can only recover the rents which accrue after the possession of the tenant becomes unlawful; the rents accruing prior to that time are not recoverable: *Howard v. Valentine*, 20 Cal. 282. The amount of rents is immaterial, and whether it is one dollar or one thousand dollars, the jurisdiction is the same: Id. Rents and profits may be awarded as damages without the value thereof being stated in the complaint: *Holmes v. Horber*, 21 Cal. 55. But if the action be for default in payment of rent, the amount must be stated: Cal. Code C. P., sec. 1166. The plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, without regard to the nature or the extent of the right or title by which he held the possession: *Roff v. Duane*, 27 Cal. 568.

27. Restitution and Damages.—As to restitution and damages, see Cal. Code C. P., sec. 1174.

28. Restitution—Writ of.—Where a sheriff refuses to execute the writ on the ground that the premises are in possession of persons not parties to the suit, but who claim to hold under one of the defendants, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ: *Fremont v. Crippen*, 10 Cal. 211. Where in forcible entry and detainer, plaintiff had judgment in the justice's court, and was placed in possession of the land by a writ of restitution, and subsequently defendant gave bond and appealed to the county court, where, after trial, there was a verdict for de-

fendant: *Held*, that the county court had power, after reversing the judgment of the justice, to award defendant a writ of restitution; that such a writ was necessary to perfect the jurisdiction of that court over the subject: *Kennedy v. Hamer*, 19 Cal. 375. *Stark v. Barnes*, 4 Cal. 412, does not hold that a party succeeding to the original wrongful possession is liable in action of forcible entry and detainer in the same manner as his predecessor, because there Barnes came in without any new title, and merely succeeded to the claim, and consummated the trespass of the original trespasser: *Id.* For damages, see *ante*, note 8.

29. Separate Statement.—Forcible entry and forcible detainer are separate causes of action, and ought to be separately stated in different counts in the complaint. If not so stated the complaint is bad on demurrer, but if the complaint is not demurred to, the objection is waived. Fraud, if relied on, should also be separately stated: *Valencia v. Couch*, 32 Cal. 340.

30. Showing Required of Plaintiff or Defendant upon Trial.—Actual force is not necessary, but threats and showing an intention to resort to violence if resistance is offered, is sufficient: *O'Callaghan v. Booth*, 6 Cal. 63. The plaintiff in this action must show an actual peaceable possession in himself, at the time of the entry: *Treat v. Stuart*, 5 Cal. 113. What is actual, and what is constructive possession, is a question for the jury in many cases: *O'Callaghan v. Booth*, 6 Cal. 63. Where the complaint avers forcible and unlawful entry, and that the defendant forcibly detained the premises so unlawfully taken, forcible entry must be proven—the averment of detainer not being stated as an independent ground of relief: *Preston v. Kehoe*, 15 Cal. 315. In such action, proof of forcible detainer does not prove forcible entry: *Id.* If the plaintiff seeks to recover on the ground of a forcible entry and detainer, and the proof shows that there was no actual force, and that he neither apprehended, nor had any ground to apprehend any positive act of violence from the defendant, he cannot recover: *Thompson v. Smith*, 28 Cal. 527. The evidence must tend to prove an entry by the defendants with strong hand, with unusual weapons, or with menace of life or limb, or they cannot be convicted of a forcible entry: *McMinn v. Bliss*, 31 Cal. 122. “On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer:” Cal. Code C. P., sec. 1172.

31. Treble Damages.—The power of the county court to treble the damages by way of penalty in actions of forcible entry results by necessary implication from its power to try *de novo*: *O'Callaghan v. Booth*, 6 Cal. 63; see Code C. P., sec. 1174.

32. What must be Shown.—The plaintiff must show that he was “peaceably in the actual possession, at the time of the entry,” and peaceable possession will not be presumed from actual possession: *Warburton v. Doble*, 38 Cal. 619; see, also, Cal. Code C. P., sec. 1172.

33. When an Action can be Maintained.—S. was in possession of a quartz mill under a lease. The mill had been run until one or two o'clock in the morning, when the employees of the plaintiff closed up and retired to rest in the mill. Before daylight, and while the hands were actually sleeping in

the mill, and the products of the last day's work were still in the amalgamating tubs, the defendants—some five or six in number—entered the mill, took possession, commenced tearing down the stamps under pretense of making repairs, and retained possession against repeated demands and protest of the plaintiff and his employees. *Held*, that these facts constitute sufficient evidence of force to maintain the action of forcible entry: *Scarlett v. Lamarque*, 5 Cal. 63; commented on in *Fogarty v. Kelly*, 24 Id. 319. Where in ejectment by B. v. K., a writ of restitution was issued on judgment in favor of B., and under it K. was removed from the land by the proper officer, and W. put in possession as agent of B., and then, about a month afterwards, W. leased the premises to H.: *Held*, that K. cannot maintain forcible entry and detainer against H., the lessee, on the ground that the act of the officer in removing and putting W. in possession was tortious, because not justified by the writ: *Kennedy v. Hamer*, 19 Cal. 375; *Janson v. Brooks*, 29 Id. 214.

34. When it Cannot be Maintained.—Facts which might constitute a mere trespass upon property have never been held to sustain the action of forcible and unlawful detainer: *Frazier v. Hanlon*, 5 Cal. 156; *Merrill v. Forbes*, 23 Cal. 379. So of one who enters upon land for the purpose of cutting and taking away grass or crops growing thereon, without any intention of taking possession of the land, and without residing thereon: *Merrill v. Forbes*, 23 Cal. 379. When one person has a house upon a portion of a tract of land of one hundred acres which he is occupying, and another person enters upon another part of the tract and erects a house, without doing anything further, this act does not constitute a forcible entry upon and detainer of the whole tract: *Thompson v. Smith*, 28 Cal. 527. A sheriff is not guilty of a forcible entry, if acting in good faith, by virtue of a writ of restitution, he removes from the premises a person against whom the writ does not run, and who is not in privity with any one against whom the writ does run: *Janson v. Brooks*, 29 Cal. 214.

No. 536.

ii. *For Forcible Entry and Forcible Detainer.*

[TITLE.]

The plaintiff complains, and alleges:

First—For a first cause of action:

I. and II. [As in preceding form.]

Second—For a second cause of action:

I. That the said defendant, by force and with a strong hand [or by menaces and threats of violence, stating the facts], unlawfully holds and keeps possession of said land and premises in the first cause of action mentioned, and has so held and kept possession of the same at all times since the said . . . day of . . . , 187 . . . , contrary to the form of the statute.

II. That the plaintiff was on the day last aforesaid, and still is, entitled to the possession of said lands and premises.

III. That in consequence of said acts, the plaintiff has been deprived of the rents, issues and profits of said lands and premises, to his damage.....dollars.

[*Demand of Judgment.*]

NOTE.—The second cause of action is here alleged as an incident to the forcible entry, and to recover rents and profits.

No. 537.

iii. *For Forcible Detainer under First Subdivision, Section 1160.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of....., 187., he was well entitled to the possession of the following described premises [describe the same] and on that day the defendant peaceably [or otherwise, according to the fact], but without right so to do, entered and took possession of the same and from that day hitherto has kept, and still holds and keeps possession of the same unlawfully and by force [or by menaces and threats of violence, stating the same], contrary to the form of the statute in such case made and provided.

II. [If any special injury has been done the property by the defendant, allege the same, and state amount of damages.]

III. That in consequence of the said unlawful acts of the said defendant, the plaintiff has been deprived of the rents, issues and profits of said land and premises ever since said.....day of....., 187., to his damage.....dollars.

[*Demand of Judgment.*]

No. 538.

iv. *For Forcible Detainer, under the Second Clause of Sec. 1160.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, and for five days previous thereto, he was in the peaceable and actual possession and occupation, and entitled to the possession of all that certain piece or parcel of land [describe the premises], and of the dwelling house, barns, and sheds thereon.

II. That on the.... day of....., 187., in the night-time [or during the absence of the plaintiff], the defendant unlawfully entered upon said lands and tenements, and took possession of the same.

III. That on the ... day of, 187., at, the plaintiff made a demand in writing upon the defendant, to deliver up to the plaintiff the possession of said land and premises held as aforesaid, but the defendant neglected and refused for the period of five days after such demand, and at all times since, to surrender the possession of the same to the plaintiff, and still holds and continues in possession of said premises, against the form of the statute.

IV. That in consequence of said acts, the plaintiff has been deprived of the rents, issues, and profits of said land and premises, to his damage dollars, and has sustained damage for waste and injury committed thereon in the sum of dollars.

[*Demand of Judgment.*]

35. Actual Possession.—Where plaintiff had been in the peaceable and quiet possession and use of the premises, through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in the “actual possession” of the premises, within the statute of forcible entry and detainer: *Minturn v. Burr*, 16 Cal. 107; see Note 40.

36. Distinction of Causes of Action.—F. brought an action against K. for an unlawful entry and forcible detainer. F. did not reside on the premises, and his only possession consisted in an inclosure and cultivation. K. went within the inclosure in the night-time, erected a cabin, and, at some subsequent period of time, declared he would keep possession by force. The court instructed the jury that if they found “that the defendant entered upon the premises in the night-time, during the hours of sleep, while the plaintiff was in the actual and peaceable possession of the same, and that he took possession and avowed the intention to keep possession, and actually did keep possession, it was sufficient evidence of force to maintain the action of forcible entry and detainer, and the jury should find for the plaintiff.” *Held*, that the instruction was erroneous, as applied to the testimony of this case, because that portion of it relating to K.’s intention to keep possession made no reference to any demand on the part of F. for possession, and because the instruction was framed as though it related to a question of forcible entry, and not forcible detainer: *Fogarty v. Kelly*, 24 Cal. 317.

37. Forcible Detainer.—The declaration of the defendant to the plaintiff that he will not go off the premises unless put off by force or by law, does not constitute a forcible detainer: *Hodgkins v. Jordan*, 29 Cal. 577. The mere surmise of a person, that if he attempts to regain possession, force will be used to prevent it, is not enough to show a forcible detainer, but an attempt must be made to regain possession, and either force or threats of force used to resist it: *Id.* P. had possession of a lot of land, by having it inclosed with a fence, but did not reside on it, nor have a house on it. M. and D. entered into possession, and built a house on the premises and moved into it. Five days afterwards an agent of P. went to the premises and told M.

and D. that he had come there to take possession for P. They replied that it would be very foolish to give up the lots after making improvements on them; that they would not leave, and that it would take a pretty good force to put them off; that they had paid their money for the lots, and they would be d—d if they would leave. To another agent of P., M. and D. used substantially the same language: *Held*, that this did not amount to a forcible entry or unlawful detainer; that such acts amount merely to a trespass and ouster of P., for which ejectment was the proper remedy: *Polack v. McGrath*, 25 Cal. 56. A naked avowal of an intention to keep possession, and actually keeping possession, do not necessarily constitute such force or threat of force, as to render a detainer forcible, where there has been an unlawful entry, unless such avowal is made in answer to a demand for possession by the party claiming to have been ousted, and is accompanied by some act or word of the party making the unlawful entry, showing an intent on his part to maintain the possession by force: *Fogarty v. Kelly*, 24 Cal. 317; see Cal. Code C. P., sec. 1160.

38. Joinder of Causes.—A cause of action in unlawful detainer cannot be joined with one for forcible entry or forcible detainer: *Polack v. Shafer*, 46 Cal. 270. And it would seem that a cause of action for forcible entry could not be joined with one for forcible detainer: *Treat v. Forsyth*, 40 Cal. 484. But see *Shelby v. Houston*, 38 Cal. 410.

39. When Action Cannot be Maintained.—If the entry of the defendant was lawful, the plaintiff cannot, when his right to the possession has expired, expel him therefrom, or by using or threatening force, make his entry unlawful: *Owen v. Doty*, 27 Cal. 502.

40. Occupation.—The occupant of lands is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands or tenements: Cal. Code C. P., sec. 1160. The true intent and meaning of the Legislature in the use of the word occupant is found in the words "peaceable and undisturbed possession." And the plaintiff is not required to show a possession which differs at all from the possession which he would have to show were he seeking relief in an action for forcible entry: *Shelby v. Houston*, 38 Cal. 410. It has never been considered that an actual residence, a personal presence, was in all cases indispensable to actual possession. On the contrary, actual possession as much consists of a present power and right of dominion as an actual corporal presence in the house: *Minturn v. Burr*, 16 Cal. 109. Under this rule the plaintiff might have had "a peaceable and undisturbed possession," notwithstanding the fact that he did not reside in the house: *Shelby v. Houston*, *supra*.

41. Unlawful Entry.—An unlawful entry is a peaceable entry made in bad faith; that is to say, without any *bona fide* claim or color of legal right to enter, and not a peaceable entry made in good faith, although wrongfully; that is to say, in the belief that there is a legal right to enter: *Shelby v. Houston*, 38 Cal. 410. The plaintiff must have had the actual possession when the wrongful or forcible entry was made; and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful: *Owen v. Doty*, 27 Cal. 502; but see Cal. Code C. P., sec. 1160.

*No. 539. .**i. Holding Over after Rent Due.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the day of, 187., the said plaintiff by a lease, made on or about the said day at the, County of, leased, demised and let to the said defendant, of the said, County of, the premises situate, lying and being in the County of, State of, and described as follows, to wit [describe premises], to have and to hold the said premises, to the defendant, for the term of, months thence next ensuing, at the monthly rent of dollars, payable in advance.

II. That by virtue of said lease the defendant went into the possession and occupation of the demised premises, and still continues to hold and occupy the same.

III. That according to the terms of said lease there became due, on the day of, 187., for the rent of said premises, the sum of dollars.

IV. That on the day of, 187., and within one year after said rent became due as aforesaid, by the terms of said lease, demand in writing was made by the plaintiff of [the lessee], for payment thereof, or that he surrender the possession of said premises held as aforesaid, to the plaintiff, but said defendant neglected and refused, for the space of three days after said demand as aforesaid, to quit the possession of the said demised premises, or to pay the rent thereof due and unpaid as aforesaid, and the same still remains due and unpaid.

V. That said defendant unlawfully holds over and continues in the possession of the said premises, after default in the payment of the rent as aforesaid, and without the permission of the plaintiff; by reason whereof the plaintiff has sustained damages in the sum of dollars.

Wherefore the said plaintiff prays judgment:

1. For the sum of dollars damages for waste and injury, and for the detention of said premises.

2. For the sum of dollars, rent due as aforesaid, and restitution of the said premises.

3. That said damages may be trebled, together with costs of suit.

NOTE.—If the property is in the possession of a sub-tenant, that fact should be averred, and also that the notice to pay the rent due or surrender possession was served on both tenant and sub-tenant, see Cal. Code C. P., sec. 1161, and both must be made parties: Id. sec. 1164.

No. 540.

ii. Holding Over After Expiration of Term.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the....day of....., 187.., the said plaintiff, by alease made on or about the said day, at the....., County of....., leased, demised, and let to the said defendant, of....., County of....., the premises situate, lying and being in the County of, State of....., and described as follows, to wit: [describe property], to have and to hold the said premises, to the defendant, for the term of....years from the....day of....., 187.., at the yearly rent of.....dollars, payable.....in advance.

II. That by virtue of said lease, said defendant went into possession of said premises, and he and others under him still continue to hold and occupy the same.

III. That the term for which said premises were demised as aforesaid has terminated, and that the said defendant holds over and continues in possession of the said demised premises, without the permission of the said plaintiff, and contrary to the terms of said lease.

IV. That the said plaintiff since the expiration of the term for which said premises were demised as aforesaid, to wit: on the....day of187.., made demand in writing of the said defendant to deliver up and surrender to him the possession of said premises.

V. That more than three days have elapsed since the making of such demand, and the defendant has refused and neglected, for the space of three days after such demand, to quit the possession of said demised premises, and still does refuse, contrary to the form of the statute in such case made and provided.

VI. That the monthly value of the rents and profits of the said premises is the sum of.....dollars.

Wherefore the said plaintiff prays judgment:

1. For the restitution of the said premises, and for damages for the rents and profits of said premises.

2. That such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of dollars per month, besides costs of suit.

NOTE.—Under the Cal. Civ. Code estates are divided as follows: 1. Estates of inheritance; 2. Estates for life; 3. Estates for years; or, 4. Estates at will: Sec. 761.

42. Complaint, what to Contain—Fraud may be Charged: See Cal. Code C. P., sec. 1166. Requisites of a complaint by a landlord to recover possession of demised premises for non-payment of rent, see *Mayor of N. Y. v. Campbell*, 18 Barb. 156.

43. Damages.—The plaintiff cannot prove damages sustained by the defendants holding over in respect to their property immediately adjoining the demised premises, respecting which the relation of landlord and tenant was not subsisting: *Kower v. Gluck*, 33 Cal. 401. As to damages, consult Cal. Code C. P., sec. 1174.

44. Demand of Rent and for Delivery of Possession.—If a tenant holds over after rent has become due and remains unpaid for the space of three days, a demand by the landlord of the payment of rent and delivery of possession, both made at the same time, will enable him to maintain an action for unlawful holding over. It is not necessary to demand rent and wait three days, and then demand possession: *Brummagin v. Spencer*, 29 Cal. 661. The demand should now be made in the alternative, for the payment of the rent, stating the amount, or the possession of the property: Cal. Code C. P., sec. 1161. A waiver of the demand will never be implied for the purpose of making a forfeiture. A forfeiture cannot take place by consent, and it is not favored by the rules of law: *Gaskill v. Trainer*, 3 Cal. 334.

45. Entry, how Made.—A landlord has no right of entry for breach of covenant in a lease, and to forcibly eject the tenant, the lease reserving no such right of entry: *Fox v. Brissac*, 15 Cal. 223. If the landlord does so enter and eject the tenant, the tenant may recover damages in trespass, for the vegetables and grape vines growing on the land, and planted by the tenant for sale, he not being permitted to enter and gather them: *Id.*

46. Notice to Quit.—By the terms of an award which was decisive between a landlord and his tenant, the latter was to leave the premises on the ninth: *Held*, that the plaintiff had no right to give notice to quit until the tenth, after which the plaintiff had six (now three, Cal. Code C. P. sec. 1161) days to remove, wherefore the action commenced on the tenth was premature: *Ray v. Armstrong*, 4 Cal. 208. In an action where the evidence showed a tenancy from year to year, plaintiff must show that he has terminated the tenancy by notice to quit, and if the tenant be permitted to hold over without such notice, a new term is created, and he cannot be legally dispossessed: *Sullivan v. Cary*, 17 Cal. 80; see Cal. Civ. Code, sec. 1945. When notice is served on the original lessee, the notice binds the under tenants who

acquire possession from the tenant after its service: *Schilling v. Holmes*, 23 Cal. 227; and they are liable to the landlord for double the monthly value of the premises: *Id.*; see Cal. Code C. P., sec. 1164.

47. Notice, Tenant not Entitled to.—Where defendant held, as tenant under J. S. in his life-time, under whom, as heir at law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such: *Held*, in an action for use and occupation, that this refusal terminated the tenancy, and overweighed the presumption of a contract between defendant and plaintiff: *Sampson v. Schaffer*, 3 Cal. 190. The denial of title and the relation of tenant makes defendant a trespasser, and not entitled to notice to quit before suit in ejectment, and no special demand for payment of rent is necessary to make a forfeiture, as defendant could not deny title and yet claim the benefit of holding in subordination to it: *Smith v. Ogg Shaw*, 16 Cal. 88.

48. Notices, how Served.—For the mode of serving notice to terminate tenancy at will, and all notices under the provisions of sec. 1161, Cal. Code C. P., see *Id.*, sec. 1162.

49. Parties.—As to the necessary parties defendant, see Cal. Code C. P., sec. 1164. If a landlord sells the leased property, and assigns to the purchaser the lease, and the tenant does not attorn to the purchaser, or recognize him as landlord, the purchaser cannot recover possession of the premises from the tenant under the act concerning forcible entries and unlawful detainers: *Reay v. Cotter*, 29 Cal. 168. An attempt was made to give the successor in interest of the landlord the right to bring the action by amending section 1161, Cal. Code C. P., in 1877-8, but as there were two amended sections of that number approved on the same day, there is some doubt as to which is in force. The tenant cannot, by submitting to being wrongfully turned out of possession under a writ which did not run against him, and then attorning to the plaintiff in the writ, prevent his first landlord from recovering possession against him for non-payment of rent: *Calderwood v. Peyser*, 31 Cal. 333. The relation of landlord and tenant is not dissolved by the execution of papers intended as an assignment of the lease to the landlord, and release and cancellation of the lease. A surrender in fact of the demised premises is essential to the completion of a dissolution of that relation. A possession by the tenants, after the execution of the papers mentioned, of the demised premises, renders them liable to be proceeded against under the act concerning forcible entries and unlawful detainers: *Kower v. Gluck*, 33 Cal. 401.

50. Relation of Landlord and Tenant.—The production of a lease in evidence will not, of itself, prove the relation of landlord and tenant to have existed between the lessor and lessee, but the entry of the lessee under the lease, or a holding by him referable to the lease, must also be proven: *Caldwell v. Center*, 30 Cal. 539. A., who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B. and C., by which they were to prospect for coal until they struck a particular seam or ledge, and before they struck this ledge they were to do all the work, and have two thirds of the claim; but after the ledge was struck the work was to be prosecuted by the parties jointly, A. to bear one third of the expenses, and B. and C. two thirds: *Held*, that this agreement did not create the relation of landlord and tenant between A. and B. and C., but that it made them tenants in common, or partners in mining, and that the action of unlawful detainer

was not the proper remedy for A., if excluded from the premises by B. and C.: *Henderson v. Allen*, 23 Cal. 519.

51. Relation must be Shown.—An action for an unlawful holding over cannot be maintained unless the relation of landlord and tenant is shown to exist between the plaintiff and defendant at the time of making demand for possession: *Steinback v. Krone*, 36 Cal. 303; *Reay v. Cotter*, 29 Id. 168; *Pico v. Cuyas*, 48 Id. 639.

52. Remedy.—In addition to the summary remedy, see Cal. Civ. Code, sec. 793, and the remedy therein provided; see, also, *Hawzhurst v. Lobree*, 38 Cal. 563.

53. Repairs—Duty of Tenant.—If the embankment of a natural reservoir which is filled with water by unusual rains is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if "damages by the elements or acts of Providence" are excepted from his covenant: *Polack v. Pioche*, 35 Cal. 416.

54. Rent.—There is no error in finding the amount of rent due at the time of the trial: *Mason v. Wolff*, 40 Cal. 246. If the tenant is forcibly evicted by the landlord from a substantial part of the demised premises, but continues to occupy the remaining portion under the lease, he cannot be proceeded against in unlawful detainer for the non-payment of rent while the eviction lasts: *Skaggs v. Emerson*, 50 Cal. 3.

55. Reversal of Judgment.—If plaintiff recovers judgment and is placed in possession of the land and defendant appeals, and the judgment is reversed, the latter is entitled to be restored to the possession, even if the plaintiff has leased the premises: *Pico v. Cuyas*, 48 Cal. 639.

56. Tenant at Will.—A tenant at will is one who holds rent free by permission of the owner, or where he enters under an agreement to purchase, or for a lease, but has not paid rent. The great criterion by which to distinguish between tenancies from year to year, and at will, is the payment or reservation of rent: Bouv. Law Dict. A tenancy at will cannot exist without express grant or contract, and where it does exist, the tenant is entitled to reasonable notice of his landlord's intention to terminate the estate before an action can be maintained against him for the possession: *Blum v. Robertson*, 24 Cal. 128. A grantor who remains in possession does so as tenant at will of the grantee: *Brooks v. Hyde*, 37 Id. 366. Notice of not less than one month is required to terminate it: Cal. Civ. Code, sec. 789.

57. Tenancy for Years.—A tenancy for the specified period of one month is a tenancy for years, and not a tenancy from year to year or month to month; but if a tenant for the specified period of one month holds over with the consent of his landlord, he thereby becomes a tenant from month to month: *Stoppelkamp v. Mangeot*, 42 Cal. 317. An estate for years is one that is founded upon contract express or implied, which is not determinable at the will of either party, but endures for a time certain: Wash. on Real Prop. vol. 1, p. 434 (4th Ed.).

58. Tenant, Liability, Rights, and Duties of.—An under tenant, who takes a lease and receives possession from the tenant, becomes the tenant of the landlord, subject to all the duties and liabilities of a tenant to the landlord: *Schilling v. Holmes*, 23 Cal. 227. The tenant is liable to pay rent until

he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord's: *Id.* If the tenant is evicted by a wrong-doer, the landlord is not bound to indemnify him: *Id.* If a tenant denies the relation of landlord and tenant, and refuses to pay rent, he cannot afterwards revive that relation by offering to pay rent: *Conner v. Jones*, 28 Cal. 60; but see Cal. Code C. P., secs. 1174 and 1179.

59. Tenant, Duties of.—One of the most important duties of a tenant is to peaceably and quietly surrender the premises to the landlord as soon as the tenancy has expired: *Schilling v. Holmes*, 23 Cal. 227. If a stranger intrudes on the premises and takes possession, either forcibly or otherwise, it is the duty of the tenant to take proper legal proceedings to regain the possession, so that he may surrender the same to the landlord: *Id.*; see Cal. Civ. Code, sec. 1949.

60. Term, Expiration of.—If the tenant takes a receipt from his landlord, specifying the amount of rent paid, and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such cases: *Blumenberg v. Myres*, 32 Cal. 93. When the lessee holds over, and the landlord receives rents after the expiration of the term, a new tenancy arises by implication, subject to the covenants and conditions of the original lease, but the new term is not necessarily for one year: *Id.* If the lessee sub-lets the leased premises for the entire term of his lease from the lessor, no right of entry remains in him upon the expiration of the term. The right of entry is in him who holds the reversion: *Id.* If a tenant for one year or more, before the expiration of this term procures the landlord's receipt for one month's rent commencing at the expiration of the term, a new tenancy of one year is not thereby created: *Id.*; see Cal. Civ. Code, secs. 1943 to 1947 inclusive.

61. Termination of Tenancy.—The tenancy is terminated by an eviction; and a subsequent taking and holding by the tenant, under a lease from the evictor, is not in subordination to the title of the original lessor: *Steinback v. Krone*, 36 Cal. 303; citing as authority *Wheelock v. Warschauer*, 21 Cal. 316; and S. C., 34 Cal. 265.

62. Unlawful Detention.—As to what constitutes unlawful detainer, see Cal. Code C. P., sec. 1161.

CHAPTER II.

TAXES AND TAXATION.

The provisions of the Cal. Political Code, sec. 3716, are as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied, nor the lien removed until the taxes are paid or the property sold for the payment thereof." The following sections make a tax due on personal property a lien upon the real property of the owner, from and after the time it becomes delinquent, and every tax due upon real property a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate, a lien upon the land and improvements, and that these liens attach as of the first Monday in March in each year. Section 3764 *et seq.* provides for the publication of the delinquent list and notice of sale, the manner of sale, time, place, etc. With these provisions in force, it can rarely become necessary or advisable to sue for the collection of a tax. There are certain cases, however, in which suits are expressly authorized by the Political Code: 1. For the collection of taxes assessed on personal property from persons who have removed to another county: Sec. 3808. 2. Where the assessment upon real estate is valid in part and void for the excess; and the owner or his agent shall, not less than six days before the day of sale, deliver to the tax collector a protest in writing, specifying the portion of the tax which he claims to be invalid, and the grounds upon which the same is based. In such case the tax collector may either sell or withdraw the property from sale, and report the case to the state board of equalization for its direction; and the board may either direct the foreclosure of the lien by action, or direct the collector to proceed with the sale: *Id.* secs. 3811, 3812. The controller may direct the collector not to proceed with the collection of any tax amounting to three hundred dollars, further than to offer for sale but once any property upon which such tax

is a lien. If the property is not sold upon such offer, the tax collector, or if he refuses or neglects to do so, the controller, may proceed by civil action in the proper court in the name of the people of the state of California, to collect such tax and costs: Id. sec. 3899.

No. 541.

i. Against Person Removed to Another County.

[TITLE OF COURT.]

A. B., Assessor of ——— County, in the State of California, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;"><i>against</i></div> C. D., Defendant.	}
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The plaintiff complains, and alleges:

I. That he is the assessor of said county of

II. That there was duly assessed upon personal property of the said defendant in the said county of, the sum of dollars for county purposes; and the further sum of dollars for state purposes, for the year 187., upon which said several taxes there has accrued a penalty of per centum for the non-payment together with interest on the said taxes at the rate of per cent. per month, from the day of, 187., all which said several taxes, penalties and interest, remain wholly unpaid.

III. Said taxes were assessed upon the following property, to wit: [enumerate or briefly describe the property as in the assessment list].

IV. That at the time said taxes were assessed upon said property, the defendant resided in the said County of, and afterwards, to wit, on or about the day of, 187., removed therefrom to the said County of

Wherefore the plaintiff, as such assessor, demands judgment against the said defendant for the sum of dollars, being the amount of said taxes, penalties and interest aforesaid, and costs of suit.

1. Assessor as Plaintiff.—Such suit must be brought in the name of the assessor: Cal. Pol. Code, sec. 3808.

2. Evidence.—“On the trial a certified copy of the assessment, signed by the auditor of the county where the same was made, with the affidavit of the collector thereto attached, that the tax has not been paid, describing it as on the assessment book or delinquent list, is primary evidence that such tax

and the per centum is due, and entitles him to judgment, unless the defendant proves that the tax was paid:" Cal. Pol. Code, sec. 3809.

3. Expenses, how Paid.—The treasurer and auditor must allow the expense of collecting such tax, and permit a deduction thereof from the amount collected, if they do not exceed one third of the amount so collected: Cal. Pol. Code, sec. 3810.

4. City and County of San Francisco.—For the form of complaint for the collection of taxes upon personal property in the city and county of San Francisco, and the evidence upon which an action may be sustained, see Statutes of 1877-78, pp. 338, 339.

5. Complaint in Action for Taxes.—For form of complaint in an action to recover taxes, amounting to three hundred dollars, after the property has been once offered for sale, see Cal. Pol. Code, sec. 3900. In such action an attachment issues in form as prescribed under section 540 of the Code C. P. If the plaintiff recovers judgment, an attorneys fee of ten per cent. on the amount of the tax is included in the judgment. The action is brought in the name of the people of the state of California: Id. A certified copy of the entries on the delinquent list is *prima facie* evidence that the person against whose property the tax was levied is indebted to the plaintiff in the amount of such tax: Id.

No. 542.

ii. *State and County Tax—Known Owners.*

[STATE AND COUNTY.]

[COURT.]

THE PEOPLE OF THE STATE OF CALIFORNIA,

against

JAMES JONES, JOHN DOE and RICHARD ROE, and the real estate and improvements hereinafter described, Defendants.

The People of the State of California, by, District Attorney of the County of, complains of James Jones, John Doe and Richard Roe, whose real names are to plaintiffs unknown, and who are therefore sued by the fictitious names last aforesaid, and, and also the following described real estate and improvements, to wit: That certain piece or parcel of land, situated in said County and State, known and described as [describe real estate with same particularity as in action of ejectment], and all and every part and parcel of the improvements on said land; and for cause of action say:

I. That between the day of, 187., and the day of, 187., A. B., in the County of, in the State of, then and there being County Assessor of said County, did duly assess and set down upon

.....,
District Attorney, County of.....

No. 543.

iii. *State and County Tax—Unknown Owner.*

[STATE AND COUNTY.]

[COURT.]

THE PEOPLE OF THE STATE OF CALIFORNIA,

against

DOE No., JOHN DOE and RICHARD ROE, and the real estate and improvements hereinafter described, Defendants.

The People of the State of California, by District Attorney of the County of, complain of Doe No., John Doe and Richard Roe, whose real names are to plaintiffs unknown, and who are therefore sued by the fictitious names last aforesaid; and also the following described real estate and improvements, to wit: [describe real estate with same particularity as in action of ejectment], and all and every part and parcel of the improvements on said land; and for cause of action say:

I. That between the day of, 187..., and the day day of 187..., in the County of, in the State of, A. B., then and there being County Assessor of said County, did duly assess and set down upon an assessment roll all the property, real and personal, in said County subject to taxation; that said assessment roll was afterwards submitted to the Board of Equalization of said County, and was by said Board duly equalized, as provided by law; that the same Doe No., John Doe and Richard Roe were, at the time the said property was so assessed, and still are owners of the land and improvements above described, and were at the time said assessment was made, absent therefrom and from the said County, and were during all the time aforesaid and still are liable for and in duty bound to pay the taxes herein specified; that the names of the owners of the said land and improvements, and the names of the defendants last aforesaid were, during all the time aforesaid, and still are unknown to the said Assessor, and unknown to the said plaintiffs, and the above described lands and improvements were so assessed at the time and place aforesaid, in the manner provided by law, to "unknown owners," to wit:

Said real estate, valued and so assessed at \$.....

Said improvements, valued and so assessed at \$.....

II. That each of the persons, defendants herein, have and claim a title to and interest in the said real estate, improvements on real estate and personal property, and are liable for and in duty bound to pay the taxes herein specified; that upon said property there has been duly levied for the fiscal year A. D. 187..,

A State tax of - - \$.....

A County tax of - - \$.....

Amounting in the whole to \$.....

All of which is due and unpaid; of which amount dollars was duly assessed and levied against the real estate aforesaid, and dollars against the improvements aforesaid.

Wherefore said plaintiffs pray judgment against said persons, defendants herein, for the sum of dollars, and separate judgment against said real estate and improvements for the sum of dollars, and that said real estate and improvements be sold to satisfy such separate judgment, and that all the interest and claim of each person aforesaid, defendants herein, and all persons claiming any interest in said real estate or improvements be forever barred and foreclosed; and that said taxes, and all costs subsequent to the assessment of said taxes, and all costs and expenses of this suit, be paid in gold and silver coin of the United States; and plaintiffs pray for such other judgment as to justice belongs.

.....,

[*Verification.*]

District Attorney, County of

NOTE.—In California the cases are rare where it is necessary to resort to an action for the collection of taxes, except in cases of removal from the county before the collection of taxes assessed upon personal property. In some states, however, taxes can only be enforced against real estate by action and sale under a judgment; but questions relating to the validity and regularity of the assessment of taxes, and of the proceedings for the enforcement or collection of the same, arise in many ways, and most of the notes in this chapter will, therefore, be found pertinent.

6. Action will not Lie.—An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the wording of the act creating the tax. If the act merely imposes a tax upon property, and provides a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the statute is silent as to the mode of enforcement, then an action would lie for the enforce-

ment of the obligation, for the rule is general that debt lies at common law to enforce a statutory duty or penalty of forfeiture: *State of Cal. v. Poulterer*, 16 Cal. 514. The provisions of the constitution and revenue laws on the subject of taxation are to be understood as referring to private property and persons only, and not to public property, as to state, counties, towns or municipal corporations: *People v. Doe*, 36 Cal. 220; citing *Mayo v. Ah Loy*, 32 Id. 477; Cal. Pol. Code, sec. 3607. The state cannot tax and sue itself: *People v. McCreery*, 34 Cal. 433; nor can it in person or as represented in its local subordinate government, be sued without its own consent: *Sharp v. Contra Costa Co.*, 34 Cal. 284; *People v. Doe*, 36 Id. 220.

7. Assessment.—If property is not properly assessed, the assessment and tax levied thereon imposes no legal obligation to pay the taxes so levied, on the defendants or any other person, and creates no lien on the real estate so assessed: *People v. Pearis*, 37 Cal. 259. The words "assessment" and "taxation," as used in the constitution of this state, do not have the same signification: *Taylor v. Palmer*, 31 Cal. 240. When several parcels of land are assessed to the same person, they must be separately valued, and the value of each parcel must be placed under the head "value of land:" *People v. Hollister*, 47 Cal. 408. Where property owned by S. B. Whipple, who had always been known by that name and no other, was assessed to S. M. Whipple: *Held*, that the assessment was void, because there was no designation of the proper owner: *People v. Whipple*, Id. 591. So, an assessment to the owner by his surname, leaving a blank for his given name, is void, and a deed executed to a purchaser of the land, at a sale for the tax, is void also: *Crawford v. Schmidt*, Id. 617. As to assessments, void on account of the description of the land, see *People v. Cone*, 48 Cal. 427; *People v. Hyde*, Id. 431; *People v. Hancock*, Id. 631.

8. Assessment of Valuation for Revenue Purposes.—Where, in making an assessment on real estate for revenue purposes, a dispute arose between the assessor and owner as to value, and the assessor taking away the sworn statement of the owner, with a blank left for the value, said he would submit the dispute to the board of equalization, and afterwards filled the blank in the sworn statement with a higher valuation than was admitted by the owner, and the property was taxed at that valuation, and the owner never appeared before the board of equalization: *Held*, that the assessment, though not entirely regular, was not fraudulent, and that a judgment for the tax, as assessed, should stand: *State v. Wright*, 4 Nev. 251.

9. Assessors' Duties.—It is the duty of assessors to assess all property in their respective districts, counties, etc., which comprehends all property, except that which may be denominated generally, public property: *People v. McCreery*, 34 Cal. 432; Cal. Pol. Code, sec. 3628. He must make the valuation of property: *People v. S. F. Savings Union*, 31 Cal. 132. And it must be made against the owner when known. The individual, and not the property, pays the tax: *Kelsey v. Abbott*, 13 Cal. 609; cited in *Garwood v. Hastings*, 38 Cal. 216. But if the assessor cannot find the person to be taxed, he may nevertheless assess the property: *Hart v. Plain*, 14 Cal. 148. That the assessment must be made on or before the first Monday in May, is directory: Id. The assessment roll, when completed and certified by the assessor to the board of supervisors, is the only evidence of his acts and intentions: *People v. S. F. Savings Union*, 31 Cal. 132. There is no particular form

required for the certificate: *State v. W. U. Tel. Co.*, 4 Nev. 338. The making of a certified copy by an assessor of an assessment roll made by another assessor, a previous year, is not an assessment of property: *People v. Hastings*, 29 Cal. 449. Under section 101 of the revenue act of Nevada, of 1865 (Statutes of 1865, 307), assessors may call for sworn statements of the amount and value of the proceeds of mines, but they are not bound by such statements in making their assessments: *State v. Kruttschnitt*, 4 Nev. 178; see generally, Cal. Pol. Code, secs. 3627 to 3663.

10. Auditors' Duties.—The county board of equalization being authorized to equalize taxes, if they make an order, reducing the assessments, however illegal it may be, the county auditor must be governed by their action until it is set aside by a court of competent jurisdiction: *State v. Fish*, 4 Nev. 216.

11. Board of Equalization.—The presumption of law is that a board of equalization perform their duty and correct any inequality in the assessment of taxes: *Guy v. Washburn*, 23 Cal. 111. They cannot add to the valuation of property, without evidence authorizing them to do so: *People v. Reynolds*, 28 Cal. 107. They cannot make a new assessment: *Id.*; see Pol. Code, sec. 3672 *et seq.*

12. Burden of Proof.—In a suit for delinquent taxes, it is sufficient on the part of the state to show a regular assessment, without being required to show a delinquency. The only defenses which can be made to resist a judgment are affirmative in their character, and must be specially pleaded and affirmatively made out by the defendant: *State v. Western Union Telegraph Co.*, 4 Nev. 338.

13. Capital of Bank.—The capital of a bank embraces all its property, real and personal: *New Haven v. City Bank*, 31 Conn. 106. Where the capital stock of a bank is exempted from taxation by the charter, its banking house is equally exempt with every other part of its capital: *New Haven v. City Bank*, 31 Conn. 106.

14. Capitation Tax.—The revenue law imposing a capitation tax of one dollar on all passengers carried out of the state, by stage companies, is not a regulation of commerce among the states, nor a tax on exports, and is not in conflict with the powers of the federal government: *Ex parte Crandall*, 1 Nev. 294.

15. Chose in Action.—Chose in action follows the person of those having the right. When the holder of such right resides out of the state of Nevada, this state has no jurisdiction over the person nor over the thing proposed to be taxed, and cannot tax either: *State of Nevada v. Earl*, 1 Nev. 394. The state can only tax choses in action belonging to its own citizens or residents: *Id.*

16. Claim.—The term "claim," as used in section five of the revenue act of 1861, means not only an assertion of title to, but an actual possession of the land claimed: *People v. Frisbie*, 31 Cal. 146.

17. "Claim to, and Possession of."—The claim to and possession of land, is property liable to taxation, even if the land belong to the United States, but such is not a tax upon the land itself: *People v. Cohen*, 31 Cal. 210; *People v. Frisbie*, 31 Cal. 146.

18. Collection of Tax.—A tax collector elected for a city cannot collect

the taxes of an adjoining town, even if it has, after his election, and after the levy of the tax, been annexed to the city: *Mason v. Johnson*, 51 Cal. 612.

19. Complaint.—The complaint should not only aver that the tax was levied upon and assessed against personal property, but also the kind or kinds of personal property: *People v. Holladay*, 25 Cal. 300. The complaint must aver the failure of the tax collector to collect the delinquent tax, by reason of his inability to find, seize or sell the property belonging to the delinquent: *People v. Pico*, 20 Cal. 595. A complaint in a tax suit which shows only that the property taxed was assessed as the estate of R., deceased, and that the defendants, at the time of the assessment, owned and possessed it, does not state facts sufficient to constitute a cause of action, because not showing that it was assessed to any particular party whose duty it was to pay the taxes, or that it was made to unknown owners: *People v. De Carrillo*, 35 Cal. 37. A taxpayer on the proceeds of mines may complain of inequality of assessment upon him, at any time before the taxes are collected or sued for: *State v. Manhattan Company*, 4 Nev. 318.

20. Construction of Revenue Law.—The requirement of section 101 of the revenue act of 1865, "that the value of the proceeds of mines shall be ascertained as provided in this act," has reference to the mode of allowance for the cost of working: *State v. Kruttschnitt*, 4 Nev. 178. The revenue laws are unconstitutional, so far as they exempt private property from taxation, and all parts thereof, relating to such exemption must be disregarded: *People v. Gerke*, 35 Cal. 677.

21. County Taxes—By whom Levied.—The amount of taxes for county purposes must be fixed and levied by the board of county commissioners, and without their proper action no county tax can be collected: *State v. Manhattan Company*, 4 Nev. 318.

22. Debt.—Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day, as to a sum now due and payable: *People v. Arguello*, 37 Cal. 524. Debts are declared to be personal property for the purpose of taxation, whether it be debts over due or under due: *Id.*

23. Deed.—If the statute directs the officer who sells land under a judgment for delinquent taxes, to sell the smallest quantity that any purchaser will take, and pay the judgment for the tax and costs; a deed of the officer who made the sale, which recites that he has sold the premises to the grantee who was the highest bidder therefor, is void and conveys no title: *Carpenter v. Gann*, 51 Cal. 193. A deed of land under a tax sale is only *prima facie* evidence that no redemption had been effected, and the party who makes the redemption may, in ejectment on the title acquired by the deed, prove that a redemption was effected: *Cooper v. Shepardson*, *Id.* 298. In the absence of recitals which are declared by statute to be *prima facie* evidence of title, the burden is cast upon the party relying on the deed to prove that the sale was, in fact made where the law permits it to be made: *Pierce v. Low*, *Id.* 580; see, also, *Mayo v. Haynie*, 50 *Id.* 71. The forty-fifth section of the revenue act of 1861, relating to the effect of a deed of land sold for taxes, has not been repealed: *Id.*

24. Default.—A tax payer is not in default until he has an opportunity to pay the taxes assessed against him, so that if there is no person authorized to

receive the taxes until the delinquent list goes into the hands of the district attorney, the tax payer on receiving notice of that fact, ought to be allowed to pay the tax without any penalty being imposed: *State v. Western Union Telegraph Company*, 4 Nev. 338.

25. Demand for Sworn Statement not Indispensable.—An assessment for taxes by the assessor is not vitiated by the fact that he omitted to demand a sworn statement: *State v. W. U. Tel. Co.*, 4 Nev. 338.

26. Description in Assessment.—No action can be maintained under the act of May 17, 1861, for a tax on real estate, unless the assessment has sufficiently designated the property to enable a proper description of it to be given in the complaint. A description of the land assessed, as the unsold portion of eleven square leagues of land known as Los Mokelamos, is fatally defective: *People v. Pico*, 20 Cal. 595, and cases cited in note 7, *ante*. The assessment of lands outside of a city or incorporated town need not describe the land by metes and bounds: *High v. Shoemaker*, 22 Cal. 363. Improvements on real estate and personal property need only be assessed in general terms and under a gross valuation; a specific description of such property is unnecessary: *People v. Rains*, 23 Cal. 127. The object of a description of property in an assessment roll, is to clearly identify the property assessed: *People v. Empire G. and S. M. Co.*, 33 Cal. 171. Bonds on deposit are sufficiently described by being designated "money and bonds deposited as per statute:" *People v. Home Ins. Co.*, 29 Cal. 533. An assessment of land is not void by reason of a mistake in description, unless it contains such a falsity in the designation or description as might probably mislead the owner: *Bosworth v. Danzien*, 25 Cal. 296. Under the act of 1856, a lumping assessment of personal property is bad. The different classes should be stated: *Falkner v. Hunt*, 16 Cal. 167.

27. Description of Property in Complaint.—The statute of 1861, requiring real estate, in an action to recover taxes, to be described in the complaint with the same particularity as in actions of ejectment, only applies to actions in which the real estate is made a party defendant: *People v. Leet*, 23 Cal. 161. A description of a tract of land by name is sufficient: *Id.* If a complaint in an action to recover judgment for taxes assessed on land and improvements thereon, describes the land assessed by giving its name, and metes and bounds, less certain lots sold out of the same, without giving the location and boundaries of the lots sold, the complaint is fatally defective: *People v. Mariposa Co.*, 31 Cal. 196. In a suit for taxes, evidence is admissible to prove a description of the property taxed more particular than that used in the assessment roll, if there is no contradiction in the two descriptions, and the complaint gives the description used on the trial: *State v. Real del Monte Co.*, 1 Nev. 523.

28. Dollar Mark.—Figures placed opposite the town lots in an assessment roll, without any statement whether they stand for cents, dollars or eagles, do not fix any valuation, and the assessment is defective: *Hurlbutt v. Butenop*, 27 Cal. 50; *Brady v. Seaman*, 30 Id. 610; *People v. S. F. Savings Union*, 31 Id. 132. As to what is sufficient, see *People v. Empire G. and S. M. Co.*, 33 Cal. 171; *People v. McCreery*, 34 Id. 432.

29. Domicile.—One may be a resident of one state, and taxed as such, when his domicile is in another: *Board of Supervisors v. Davenport*, 40 Ill. 137.

30. Easements.—A street railroad company's easements of running cars over tracks in a street, may be assessed as real property benefited by the widening of said street, for the expense of such widening: *Appeal of North Beach and Mission R. R. Co.*, 32 Cal. 499; *Chicago v. Baer*, 41 Ill. 306.

31. Equalization.—As to changing the assessed value of property by the board of equalization, under the Revenue Act of 1861, consult *Patten v. Green*, 13 Cal. 325; *People v. Reynolds*, 28 Id. 107; *Cent. P. R. R. Co. v. Placer Co.*, 32 Id. 582; *Guy v. Washburn*, 23 Id. 111; see, also, Cal. Pol. Code, secs. 3672 to 3705; and *People v. McCreery*, 34 Cal. 432.

32. Flume.—A flume constructed by a mining company along the bank of a river, leading to the claims of the company in the bed of the river, is taxable: *Hart v. Plum*, 14 Cal. 148.

33. Foreign Corporation.—The place for assessment of a foreign corporation doing business in this state, for the purposes of taxation, is where the principal business is transacted: *British, etc., Ins. Co. v. Commissioners of Taxes*, 31 N. Y. 32.

34. Growing Crops.—Growing crops are private property, and are subject to taxation, the provision of said statute exempting them notwithstanding: *People v. Gerke*, 35 Cal. 677.

35. House on Boundary Line.—Where a tax payer's house lies on the boundary line, and partly in two towns, it seems that he is properly taxable in the town where the most necessary and indispensable part of the house is situated, in the absence of other more controlling facts: *Judkins v. Reed*, 48 Maine, 386.

36. Impost Duties.—There is no restriction upon the taxing power of a state, except the laying of impost or duties on imports or exports, and if in the exercise of this power foreign commerce or commerce among the states be incidentally affected, the state authority must nevertheless be maintained: *Ex parte Crandall, habeas corpus*, 1 Nev. 294.

37. Improvements on Public Lands.—Improvements on public lands of the United States, whether owned by a pre-emptioner or one occupying public lands without license, are liable to assessment and taxation, if made so by the revenue laws of a state: *People v. Shearer*, 30 Cal. 645. A local tax for the purpose of internal improvements may be imposed, and the local authorities may be empowered to impose such tax: *Pattison v. Board of Supervisors of Yuba Co.*, 13 Cal. 175.

38. Judgment.—A judgment for a debt, and foreclosing a mortgage given to secure it, is subject to taxation only where the owner of the judgment resides, and then the money due upon it is only taxable: *People v. Eastman*, 25 Cal. 601. So of choses in action, and property of an intangible character, such as debts and the like: *People v. Park*, 23 Cal. 138.

39. Jurisdiction.—An action brought under the revenue act of 1861, to recover judgment for unpaid taxes, is not a case in equity, but an action at law; and where the amount is less than three hundred dollars, the district court has no jurisdiction: *People v. Mier*, 24 Cal. 61; *Bell v. Crippen*, 28 Cal. 327. If the prayer of the complaint is for a money judgment, the district court will not have jurisdiction where the amount claimed is less than three hundred dollars; but if the prayer is for the foreclosure of a lien, order of sale, etc., the district court has jurisdiction regardless of the amount claimed:

People v. Mier, 24 Cal. 61. If the action is brought under the provisions of the act of May 12, 1862, it is a case in equity, and the district court has jurisdiction, although the amount claimed is less than three hundred dollars: *Id.*

40. Kind and Quantity.—If an assessment of a tax made during the three years preceding March, 1861, is defective in not stating the kind and quantity of property assessed, whether real or personal, or if real, in not giving its description, the pleader in an action brought to recover judgment for such tax, may, if the same can be ascertained, insert in his complaint the necessary averments as to kind and quantity, or description: *People v. Holladay*, 25 Cal. 300.

41. Land Segregated.—Where a claim to a tract of land under a Mexican grant somewhere within a certain larger tract was ascertained, and the land segregated by a survey under a decree of confirmation by the United States supreme court, the land became immediately taxable: *Palmer v. Boling*, 8 Cal. 387.

42. Lands Sold by the United States.—When land of the United States has been paid for, and a certificate of purchase has been given to the purchaser, it is liable to taxation, although the patent may not have been issued: *People v. Shearer*, 30 Cal. 645.

43. Law of Tax Suits.—The strict compliance with all the provisions of the statute, required to be shown in cases where property is sold for taxes without a judgment, is not applicable to cases of suits for delinquent taxes in the district courts, where jurisdiction has once been acquired: *State v. W. U. Tel. Co.*, 4 Nev. 338.

44. Lien of Judgment.—The lien on land of a tax assessment continues after the land has been transferred to another county, and the tax collector of the original county can enforce the collection of the tax by a sale: *Moss v. Shear*, 25 Cal. 38.

45. Levy and Assessment.—The averments in the complaint in this case as to the levy and assessment are sufficient, under the act of 1860, to put upon defendant the burden of showing that it is not liable (see facts): *People v. Seymour*, 16 Cal. 332.

46. Legislative Restrictions.—The only restriction imposed upon legislative discretion in the matter of taxation, by our constitution, is that it shall be equal and uniform, and in proportion to the property taxed. It affects only the mode of taxation, and where the legislative act conforms to this rule it is binding and obligatory: *Beals, Administrator, v. Amador Co.*, 35 Cal. 624; citing *Blanding v. Burr*, 13 Cal. 350; *People v. Alameda Co.*, 26 Cal. 641; *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 435; *Town of Guilford v. Supervisors*, 18 Barb. 615; and commenting on *Beals v. Amador Co.*, 28 Cal. 449.

47. Local Laws.—Where a special act is passed by the legislature, empowering the board of supervisors of a particular county or counties to levy a tax for special purposes, it does not necessarily repeal the general act or previous special acts. The repeal of acts is by direct terms, or by implication. Repeals by implication are never favored; on the contrary, if prior and subsequent legislative enactments may well subsist together, courts are bound to uphold the former.

48. Mill Property.—Under the statute which provides that mills shall be taxable, the machinery contained in a mill is taxable as part of the mill, and it is equally taxable here, although the owners reside out of the state, and it makes no difference that the machinery is personal property: *Sprague v. Lisbon*, 30 Conn. 18.

49. Mining Interests.—The possession and interest, or the possession and claim to lands for mining purposes, the title to which land is in the United States, is property, and as such is taxable to the claimant. So held in *People v. Shearer*, 30 Cal. 656; *People v. Frisbie*, 31 Id. 146; and *People v. Cohen*, 31 Id. 216; and that such property is not exempt from taxation, consult *People v. McCreery*, 34 Id. 433; *People v. Gerke*, 35 Id. 677; *People v. Black Diamond Coal M. Co.*, 37 Id. 54. That the legislature has power to tax the interest of an occupant of a mining claim, see *State of Cal. v. Moore*, 12 Cal. 56. The value of a mining claim, that is the mine itself, cannot be taxed, but this does not exempt everything near the claim, necessary to give it value: *Hart v. Plum*, 14 Cal. 148.

50. Money at Interest Taxable.—All money at interest, secured by mortgage or otherwise, is subject to taxation, without regard to the situation of the mortgagee, whether he be solvent or otherwise, in debt or out of debt: *State v. First National Bank*, 4 Nev. 348. A different rule prevails in California: See 51 Cal. 243; and Id. 369.

51. Money in County Treasurer's Hands.—Money belonging to litigants, in county treasurer's hands, placed there by order of court, subject to the order of the court, is liable to taxation, and may be assessed to the treasurer by name, and when assessment is levied it becomes a lien on the money in the treasurer's hands: *People v. Lardner*, 30 Cal. 242. So of money in the hands of county clerk or receiver: Pol. Code, sec. 3647.

52. Money on Deposit.—A tax levied on money on deposit is legal, and the levy creates a judgment and lien on the property, having the force and effect of an execution: *Yuba Co. v. Adams*, 7 Cal. 35.

53. Moral Obligation.—The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation as the sole basis for the imposition of taxes: *Beals v. Amador County*, 35 Cal. 624. Where a prior statute for the ascertainment of a debt due from one county to another, and to provide for its payment by a tax thereby imposed, without allowing or making provision for the payment of interest thereon, under which enactment the debt was fully paid, it is competent for the legislature, by subsequent enactment, to provide for the payment of interest on such debt, by the imposition of a further tax for that purpose: Id.

54. Mortgage.—Mortgages, solvent debts and promissory notes, are not liable to taxation: *Bank of Mendocino v. Chalfant*, 51 Cal. 369; *People v. Hibernia Sav. & L. Soc.*, Id. 243.

55. National Banks.—The state may impose a tax upon the real estate and shares of national banks within its limits, but congress has reserved to itself the exclusive power over the taxation of banks and bank property of other descriptions: *State v. First National Bank*, 4 Nev. 348. Congress having pointed out a method by which the real estate of the national banks within any state may be taxed, and also the method of taxing their stock, the states are excluded from all other methods of taxation on bank property: Id.

56. National Bank Notes.—The notes, bills, bonds, etc., of national banks are the commodity in which those banks deal in the ordinary course of their business; state taxes upon them are state taxes upon the business of the bank, and such taxes the state cannot impose: *State v. First Nat. Bk.*, 4 Nev. 348.

57. Nevada.—All tangible property within the state of Nevada is subject to one, and only one annual tax. Each acre of land and each piece of coined money is liable to such tax. A tax on money at interest secured by mortgage on land is neither a tax on the pieces of money loaned, the land on which the security is taken, nor upon the paper upon which the promise to pay is written. But it is a tax upon the chose in action or right to collect the debt. Notes and county warrants are property subject to taxation under the revenue laws of the state: *Id.*

58. Notice.—When the statute provides that the district attorney, before commencing suit, shall publish notice to delinquents, it is not necessary to aver in the complaint that this notice was published, but the failure to publish this notice must be taken advantage of by plea in abatement, or it is waived: *People v. Rains* (No. 2), 23 Cal. 131.

59. Notice of Assessment.—The time prescribed by the revenue law (Stat. of 1866, 169) within which the assessor is to complete his assessment roll, is only for the convenience of other officers. If the assessor is dilatory he may render himself liable on his bond, but his dilatoriness furnishes no matter of which a tax payer can complain, or on account of which he can defeat the tax: *State v. Western Union Telegraph Co.*, 4 Nev. 338.

60. Not Debts.—Taxes are not debts within the meaning of that clause of the act which provides that the notes shall be “a legal tender in payment of all debts, public and private.” Congress by these terms only intended such obligations for the payment of money as are founded upon contract: *Perry v. Washburn*, 20 Cal. 318; see *People v. Seymour*, 16 Cal. 332.

61. Not Founded on Contract.—A tax is not founded on contract, and does not establish the relation of debtor and creditor between the tax payer and state. It is a charge upon persons or property to raise money for public purposes: *Perry v. Washburn*, 20 Cal. 318; approved in *Mendocino County v. Morris*, 32 Cal. 154. That “taxes are not debts drawing interest,” and that “a tax is a charge upon persons to raise money for public purposes,” approved in *People v. Steamer America*, 34 Id. 681. Taxes are charges imposed by or under the authority of the legislature upon persons or property subject to its jurisdiction: *People v. McCreery*, 34 Cal. 432; see *People v. Seymour*, 16 Cal. 332.

62. Obligation to Pay Tax.—A party in possession of a lot to which another has acquired title by a deed for a sale for taxes, is under no obligation to pay a tax levied after the tax deed is given: *Maina v. Elliott*, 51 Cal. 8.

63. Parties.—The “state of Nevada” is the proper party plaintiff in a suit for delinquent school taxes under section thirty-five of the act of March 20, 1865, relating to schools (Stats. of 1864–5): *State v. First National Bank* (No. 3), 4 Nev. 491.

64. Passengers Leaving State.—The tax of one dollar on passengers leaving this state is not a poll-tax, and does not conflict with the constitu-

tional provision limiting the poll-tax to four dollars: *Ex parte Crandall, habeas corpus*, 1 Nev. 294.

65. Personal.—The personal estate of a deceased person which is taxable in the town in which he last dwelt, under Rev. Stat., ch. 7, sec. 10, cl. 7, is not taxable in any other town: *Hardy v. Inhabitants of Yarmouth*, 6 Allen (Mass.) 277. Personal estate of a ward, in the possession or under the control of a guardian, is liable under the statutes to taxation in the place where such guardian resides: *Tousey v. Bell*, 23 Ind. 423.

66. Placerville.—The act incorporating the city of Placerville granted to the common council the right to levy and collect certain taxes, and constituted the city marshal *ex officio* collector of taxes, and made it his duty to collect all taxes due the city, authorized the sale of the property of delinquents for taxes due the city, and further enacted that the manner of assessing and collecting taxes, and proceedings for the sale of property in cases of delinquency, should be regulated by ordinance. The common council enacted by ordinance a mode of collecting delinquent taxes, remaining unpaid after a certain date, whereby the entire duty was devolved upon the city attorney, and the services of the city marshal dispensed with: *Held*, that the ordinance prescribing such mode was void, because in conflict with said incorporation act: *City of Placerville v. Wilcox*, 35 Cal. 21.

67. Possessory Right.—Taxation of the possessory right is not a violation of the section of the organic act which prohibits the territorial legislature from taxing the property of the United States: *Hale and Norcross Gold and Silver Mining Co. v. Storey County*, 1 Nev. 104. The object of that section was to protect the government, and not to prevent the taxation of settlers upon public lands. The possession by the citizen of, and his possessory interest in the public lands, for mining, agriculture, or other purposes, constitutes a species of property recognized by law, and is subject to taxation by the state: *People v. Shearer*, 30 Cal. 645.

68. Power of Legislature.—That the legislature has the power of taxation, see *People v. Pacheco*, 27 Cal. 175. Taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon everything which comes within its jurisdiction: *People v. Coleman*, 4 Cal. 47. A tax must have its origin in a law enacted for that purpose: *People v. McCreery*, 34 Cal. 432. It has power to regulate the mode of taxation: *De Witt v. Hays*, 2 Cal. 463. The legislature has exclusive power of apportionment and taxation. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment: *Burnett v. Mayor of Sacramento*, 12 Cal. 76. The only limitation upon the taxing power of the legislature is the provision for equality and uniformity found in section 13 of art. 4 of the constitution: *Blanding v. Burr*, 13 Cal. 343. The cases of *People v. Coleman*, 4 Cal. 46; *High v. Shoemaker*, 22 Id. 363, so far as they are in conflict herewith, are overruled in *People v. McCreery*, 34 Cal. 432. The power of taxation was given to the legislature without limit, for all purposes allowed by the constitution. As to limit of powers of taxation and appropriation, under the eighth article of the constitution, see *Nouques v. Douglass*, 7 Cal. 65. The legislature has the power of taxation, without restriction as to mode, or limitation as to time, and may prescribe a mode of correcting an informal assessment: *People v. Seymour*, 16 Cal. 332; but cannot fix the assessed value of property: *People v. Hastings*, 29 Cal. 449. The fact that the legislature has

once exercised its powers in limiting the extent of taxation in municipal corporations, under sec. 37 of art. 4 of the constitution, does not prevent it from again exercising its power, by enlarging its authority to tax, and the legislature can impose a general tax upon all the property of the state, or a local tax upon the property of particular political subdivisions, as counties, cities, and towns: *Blanding v. Burr*, 13 Cal. 343. Limitations by congress upon the right of a state to tax its citizens are to be strictly construed: *People v. Shearer*, 30 Cal. 645. It has the power to require the payment by foreigners of a license fee, for the privilege of working gold mines in the state: *People v. Naglee*, 1 Cal. 232. The power of taxation is a power which the legislature takes from the law of its creation, to impose taxes upon the property of the citizens for the support of the government: *Taylor v. Palmer*, 31 Cal. 240.

69. Practice.—Where an action to recover a personal judgment for a tax, commenced in a justice's court, is transferred to a district court, an amended complaint may be filed in the district court to enforce a lien on real estate for the tax: *People v. Nelson*, 36 Cal. 375.

70. Property in Lands, how Construed.—The term property in lands, is not confined to title in fee, but includes any usufructuary interest, whether it be leasehold or a mere right of possession: *State of Cal. v. Moore*, 12 Cal. 56.

71. Promissory Notes.—The full sum due upon promissory notes is taxable, notwithstanding a part thereof is not due until after the close of the assessment year; the word "debt" is used in the statute of 1861, p. 419, sec. 5, without limitation or qualification in respect to time when due: *People v. Arguello*, 37 Cal. 524; see Vol. I., p. 177, par. 53.

72. Property of Guardian.—The property of a guardian cannot be seized to pay taxes assessed against him upon the property of his ward: *Tousey v. Bell*, 23 Ind. 423.

73. Proceeds of Mines.—The constitutional provision, art. 10, which prescribes the taxation of all property, real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, "means that the entire annual proceeds of mines are subject to taxation, and not the mere proceeds on hand" when the assessor happens to visit the mines: *State v. Kruttschnitt*, 4 Nev. 178. Under the revenue law, as amended in 1867 (Stat. of Nev., 1867, p. 159), assessors must make their estimates of the value of the proceeds of mines on the basis of legal tender (paper currency), and all *ad valorem* taxes, whether on the proceeds of mines or other property, must be equal: *State v. Kruttschnitt*, 4 Nev. 178. The quarterly payment of taxes on the proceeds of mines, provided for by the revenue laws, are so arranged that the annual proceeds of mines do not pay a larger *pro rata*, even as to interest account, than if one annual tax for the annual proceeds were imposed, payable at the time other annual taxes are payable: *Id.* The provisions of the revenue law of 1865 (Stat. of Nev., 1865, 271), for quarterly assessments on the proceeds of mines and quarterly payment of taxes, do not impose more than a regular *pro rata* of taxation on the proceeds of mines, nor require the same property to be paid for more than once: *Id.* An assessment of the product of a mine, made under the revenue act, as amended in 1867 (Stat. of Nev., 1867, 159), must give both the amount and value of such product, and if an assessor received a sworn statement, giving

the products of a mine as bullion of a certain value without stating the amount, it is his duty to treat it as the value in gold, and add thereto a sufficient percentage to fix the paper money value, and if he omit to do so, he is derelict in his duty: *Id.*

74. Protest, Recovery Back.—If the items of a person's property are assessed and valued separately, and some of the items are not liable to taxation, and the tax collector can separate the legal from the illegal portion of the tax, he should receive the legal portion of the tax tendered him; and if he refuses to do so, and the whole tax is paid under protest, the person taxed can recover from the collector that portion which is illegal: *Bank of Mendocino v. Chalfant*, 51 Cal. 369. So, if the collector enforces the payment of a tax upon property outside of his district, a general protest will enable the party paying to recover it back: *Mason v. Johnson*, *Id.* 612. The plaintiff in such action need not aver in his complaint the precise amount of money which was illegally exacted, but may recover a less amount than that stated in his complaint: *Meek v. McClure*, 49 *Id.* 623. If a public officer has notice of the facts which render a demand illegal, and exacts the payment thereof by coercion, a protest is not necessary to enable the party so paying to recover it back; but if the officer has no notice of such illegality, a protest is necessary: *Id.* The protest must state the grounds upon which the protestor claims the demand is illegal: *Id.*

75. Railroad Companies.—Lands granted to a railroad company by congress, to aid in its construction, are not subject to state taxation until the company has complied with the condition upon which they were granted, and is entitled to a patent therefor: *C. P. R. R. Co. v. Howard*, 51 Cal. 230. As to when the company is entitled to a patent, see *Id.*

76. Real Estate.—An assessment of land to A. B. and all claimants "known and unknown," is valid and effectual against the property, even if A. B. was neither the owner of nor in possession of the property at the time of the assessment: *O'Grady v. Barnhisel*, 23 Cal. 287. Where land is unoccupied and the owner is unknown, it must be assessed to "unknown owners:" *Moss v. Shear*, 25 Cal. 38. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings: *Ferris v. Coover*, 10 Cal. 589. Lands owned by several persons as tenants in common, may be assessed to them jointly: *People v. McEwen*, 23 Cal. 54. If in assessing a city lot owned and occupied by the owner as a single lot, he assesses one part to the owner, and another part to unknown owners, the assessment to unknown owners is illegal: *Biddleman v. Brooks*, 28 Cal. 72. An assessment to M. and D., and to all owners and claimants known and unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same, is good under the act of 1854, as amended by the acts of 1857 and 1859: *Brunn v. Murphy*, 29 Cal. 326. For statutes relative to the assessment of land, see Pol. Code, sec. 3627 *et seq.*

77. Redemption.—If sufficient money is paid to the county treasurer to redeem land sold for taxes, and the payment is made for the purpose of effecting a redemption, and a receipt is taken, the redemption is effected, even if the receipt is not filed with the recorder, and recorded: *Cooper v. Shepardsen*, 51 Cal. 298.

78. Remedy at Law and Equity.—If a tax upon the franchise has been illegally imposed, or if upon the face of the proceedings a valid legal objection appears, the plaintiff has a perfect remedy at law, and a court of equity has no right to interpose: *De Witt v. Hays*, 2 Cal. 463; *Robinson v. Gaar*, 6 Id. 273.

79. Remission of Taxes.—The legislature cannot authorize the board of supervisors of a county to remit a tax, or part of a tax, within a specified district; it is in violation of the provision which requires all property to be taxed: *Wilson v. Supervisors of Sutter Co.*, 47 Cal. 91.

80. Return of List.—Returning a list of trust property to the assessor of a town in which it is not legally taxable, does not authorize its taxation therein: *Hardy v. Yarmouth*, 6 Allen, 277.

81. Right to Mine.—Where the assessor in making his assessment uses this language: "one mine of four thousand four hundred feet, situated on Last Chance Hill," it does not convey the idea that he was assessing or attempting to assess the fee of the land in which the mine was situated, but the possessory claim of the miner and right to mine on a certain lode or vein of ore. The meaning of this language is determined by common usage in this country: *State v. Real del Monte Silver Mining Co.*, 1 Nev. 523.

82. Rolling Stock of a Railroad Company.—The rolling stock of a railroad company, running its trains over a section of road under an easement or license, without a vested interest in such road, is not liable to be taxed in the county where such section of road is situated, under a law which provides that the rolling stock of a railroad company shall be taxed in the several counties, etc., *pro rata*, in proportion as the length of the main track in each county, etc., bears to the whole length of the road: *Cook County v. C. B. & R. R. Co.*, 35 Ill. 460.

83. Sale of Land for a Tax.—If a sale of land for a delinquent tax is made for a sum in excess of the tax and legal costs, the sale is void, unless the excess is less than the smallest fractional coin authorized by law: *Treadwell v. Patterson*, 51 Cal. 637.

84. Spanish Grant.—A grant of three square leagues of land made by the Mexican government, to be selected within a large tract, is real estate liable to taxation, although not yet surveyed: *People v. Crockett*, 33 Cal. 150.

85. Situs of Personal Property for Taxation.—To authorize the taxing of personal property in any other county than that in which the owner resides, it must appear that such property is kept or maintained in such county, and is not there casually, or *in transitu*, or temporarily, in the ordinary course of commerce or business: *People v. Niles*, 35 Cal. 282. A steamboat, whose owner resides in New York, and by whom it was sent to San Francisco, and used in navigation within the state, is liable to assessment and taxation: *Minturn v. Hays*, 2 Cal. 590. That it is taxed in New York is no ground that it should not be taxed here; the property of all non-residents of the state may be taxed: *Id.* And if in the possession of a trustee or agent, it may properly be assessed to the trustee or agent in possession: *People v. Home Ins. Co.*, 29 Cal. 533.

86. State Bonds.—Bonds of the state of California are personal property, within the meaning of the revenue act, and are subject to taxation: *People v. Home Ins. Co.*, 29 Cal. 533.

87. Stock of the United States.—Stock of the United States is not subject to taxation, and state laws to that end are unconstitutional, whether they impose the tax on the stock *eo nomine*, or include it in the aggregate of the tax payer's property, to be valued at what it is worth: *Bank of Commerce v. New York*, 2 Black, U. S. 620. That portion of the capital which a bank has invested in the stocks, bonds, or other securities of the United States, is not liable to state taxation: *Id.*

88. Suit by Tax Collector.—A collector of taxes cannot compel payment by suit, except in those cases in which the statute expressly confers the right: *Packard v. Tisdale*, 50 Maine, 376.

89. Submission to Illegal Taxation.—Mere submission to illegal taxation should not, except in an extreme case, be construed into a recognition, so as to estop the party taxed from denying it: *Langworthy v. Dubuque*, 13 Iowa, 86.

90. Swamp Lands.—As to assessment of swamp lands for purposes of reclamation, see *People v. Hagar*, 49 Cal. 229; *Harris v. Board of Supervisors*, *Id.* 662.

91. "Taxation" and "Taxed."—The words "taxation" and "taxed," in section 13 of art. xi of the constitution, relate to general taxes upon all property which are levied to defray the ordinary expenses of the state, county, town, and municipal governments, and not to assessments levied on lots fronting on a street in a city to pay the expenses of its improvement: *Emery v. San Francisco Gas Co.*, 28 Cal. 345.

92. Tax Sale.—Property sold for taxes must at the time of the sale be liable for the entire amount of tax for which it is sold, or the sale is void: *Bucknall v. Story*, 36 Cal. 67. A purchase of land, at a sale of the same for taxes, by the agent of one who was in possession thereof, either by himself or his tenants, does not pass or otherwise affect the title to such land: *Bernal v. Lynch*, 36 Cal. 135; citing *Kelsey v. Abbott*, 13 Cal. 609; *Moss v. Shear*, 25 Cal. 38; *McMinn v. Whelan*, 27 Cal. 318; *Coppinger v. Rice*, 33 Cal. 408.

93. Tax Sale—Injunction.—A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings that the sale would be void: *Bucknall v. Story*, 36 Cal. 67; *Dean v. Davis*, 51 *Id.* 406; *Houghton v. Austin*, 47 *Id.* 647.

94. Title.—If a person is in possession of land, claiming the same as his own, it is his duty to pay the taxes, although he has no paper title, and is a trespasser, and under such circumstances he cannot acquire an outstanding title by purchasing at a tax sale. The rule is the same if the possession is such that it would give the possessor title by the statute of limitations: *Barrett v. Amerein*, 36 Cal. 322; see, also, *Garwood v. Hastings*, 38 Cal. 216. The title acquired by the later sale for taxes must prevail over that acquired by a sale for taxes of a prior year: *Chandler v. Dunn*, 50 Cal. 15.

95. Tax Warrant.—A tax warrant may direct the tax collector to pay over the taxes when collected to the selectmen instead of the treasurer: *Clemons v. Lewis*, 36 Vt. 673.

96. Tax, where Payable.—Taxes are payable in the county where property is first assessed. The payment of a second assessment on the same property, after a removal to another place, is not a discharge of the former: *People v. Holladay*, 25 Cal. 300.

97. Time—Assessment Ended.—A complaint in an action to recover unpaid taxes is sufficient if it avers "that certain sums are due for certain taxes levied in the year 1858 upon certain real estate assessed in the year 1858," without stating that these taxes were levied under an assessment ending on the first day of March, 1858: *People v. Todd*, 23 Cal. 181.

98. Trying Legality of a Tax.—A court of equity will entertain a bill against a municipal corporation, for the purpose of trying the legality of a tax imposed by the corporation: *Worth v. Fayetteville*, 1 Wins. (N. C.) No. 2, (Eq.) 70.

99. Unauthorized Alterations in Assessment Roll.—An assessor has no power to make an alteration in the assessment roll after it has passed out of his hands. The roll in its original state is the proper assessment roll, and when it remained legible, as originally made, an unauthorized alteration does not avoid it, and that it is competent evidence on the alteration being accounted for: *State v. Manhattan Company*, 4 Nev. 318.

100. United States Land.—Lands belonging to the United States are not liable to taxation by the state, under the revenue laws of California, or the act of congress admitting the state of California into the Union: *People v. Morrison*, 22 Cal. 73.

101. Validity of Tax.—A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law, by the duly elected assessor: *People v. Hastings*, 29 Cal. 449. And when the owner is known, the assessment must be made against him: *Kelsey v. Abbott*, 13 Cal. 609. Assessment must be certain as to person, property and amount: *Id.*

102. Validity of Tax of Personal Property.—Personal property may be assessed in bulk, without statement of character of property: *People v. Sneath*, 28 Cal. 612. Assessment of personal property of a former member of a firm, made to the firm after its dissolution, is void: *Id.* Personal property may be assessed to a non-resident: *People v. Home Insurance Co.*, 29 Cal. 533. Assessing personal property to wrong owner does not invalidate the assessment: *Id.* A mortgage on such cannot be assessed, but the assessment should be made of the debt which the mortgage was given to secure: *People v. Eastman*, 25 Cal. 601.

103. Value.—An assessment of town lots, which does not give their value either in gross or in detail, is radically defective: *Hurlbut v. Butenop*, 27 Cal. 50. That an assessment is void when there is no valuation: *People v. S. F. Sav. Union*, 31 Cal. 132; cited in *Garwood v. Hastings*, 38 Id. 216.

104. Verification.—The acts in relation to the collection of delinquent taxes which compel the defendant to verify his answer, do not change the rule in the forty-sixth section of the practice act (Cal. Code C. P., sec. 437), that where a complaint is not verified a general denial of its allegations in the answer will put in issue all the material allegations: *Rowley v. Howard*, 23 Cal. 401.

*No. 544.*iv. *For Non-Payment of License.*

[STATE AND COUNTY.]

[COURT.]

THE PEOPLE OF THE STATE OF CALI- FORNIA, <i>against</i> •, Defendant.
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The People of the State of California, plaintiff in this cause, complain against, defendant herein, and for cause of complaint show and charge, that on the day of, 187., at the City of, in the said County, the said defendant did attempt to carry on, and did then and there carry on the business of [designate business], and the said defendant was then and there required by the provisions of an act entitled "An Act to Provide Revenue for the Support of the Government of this State," approved on the day of, 187., to take out a license thereto, in pursuance of the said Act. And the said defendant then and there so attempted to carry on and so carried on said business without such license and without any license thereto. And the said defendant did then and there unlawfully fail, neglect, and refuse to take out the license in such case by said Act provided, and still neglects and refuses so to do. And by reason of the premises the sum of dollars then and there became and was due from the said defendant, and payable by him to the collector of taxes of the said County [or license collector, as the case may be], and the said defendant, although often requested to do so, has not paid the said sum of money or any part thereof; but has hitherto wholly neglected and refused, and still refuses to pay the same.

Wherefore said plaintiff asks judgment against said defendant, for said sum of dollars, together with dollars damages, as by said Act provided, and the costs of this suit.

.....

District Attorney.

105. License, a Tax.—A license fee or charge for the transaction of any business is a tax within the meaning of the term "tax" as employed in section 6 of article vi of the constitution, and in section 838 of the Cal. Code Civ. Proc.: *City of Santa Barbara v. Stearns*, 51 Cal. 494.

PART FOURTH.

PLEADINGS OF DEFENDANT.

CHAPTER I.

DEMURRERS IN GENERAL.

1. A demurrer is an issue upon matter of law. Its office is to test the sufficiency of a pleading. It admits, for the purposes of demurrer, such facts as are issuable and well pleaded: *Branham v. Mayor of San Jose*, 24 Cal. 602. It is not the office of a demurrer to set out facts. All the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of those facts to constitute a cause of action or defense: *Brennan v. Ford*, 46 Cal. 12. By the old common law writers it was claimed not to be a plea, because it neither alleged nor denied any fact: Gould's Pl. 35; 2 Chitt. Pl. 678; 3 Id. 1246. But this is not now the rule: *Oliphant v. Whitney*, 34 Cal. 25; *Furniss v. Ellis*, 2 Brock. Marsh. 14; *New Jersey v. New York*, 6 Pet. U. S. 323. Yet, whether, technically speaking, it is a plea or not, in many instances it is the most important paper in the action, and when properly interposed it may settle all the issues of the case, by determining, at the threshold of the action, questions which otherwise would only be disposed of on the hearing of the facts. The question whether the plaintiff, in his complaint, has stated facts sufficient to constitute a cause of action, is thus disposed of without the introduction of testimony, or the form of a trial.

2. Whether a complaint be demurrable, is always an important inquiry, to determine which requires a careful and analytical examination. The statute of the several states

prescribes certain special grounds for demurrer, differing in some respects, but the general ground, that the complaint does not state facts sufficient to constitute a cause of action, can be interposed in all courts of common law jurisdiction.

3. The inquiries to be made by defendant, when served with the complaint, if he wishes to demur to it, are: First, "Has the Court jurisdiction of the person of the defendant?" If the answer be in the affirmative, then, Second, "Has the Court jurisdiction of the subject of the action?" For if the person or property named in the complaint is beyond the jurisdiction of the Court, for any reason which appears upon the face of the complaint, then the action must fall.

4. The second cause of demurrer under our practice, is as to the capacity of plaintiff to sue; for, should it appear, from the face of the complaint, that the plaintiff has no capacity to sue, the action likewise falls. The question of capacity to sue often arises where a married woman is plaintiff, or one of the plaintiffs, or when a minor sues, or when a person sues in a representative or official capacity.

5. But, third, the Court may have jurisdiction of the person and property of the defendant, and the plaintiff may have the legal capacity to sue, yet there may be another action pending between the same parties for the same cause; or, fourth, there may be a defect or a misjoinder of parties plaintiff or defendant. The inquiry whether there be another action pending, etc., can rarely be raised by demurrer, for, in most instances, the facts disclosing this will not appear on the face of the complaint, and hence that issue must be presented by the answer. But whether there is a misjoinder or defect of parties, plaintiff or defendant, is a question requiring a careful consideration. This may generally be settled by the inquiries: "Has the plaintiff or defendant an interest in the event of the suit?" "Will his rights be adjudicated upon in the action?" or, "Will the rights of another person, not a party to the action, be affected in the disposition of the cause?" The interest or right thus to be affected must be an actual, existing interest, an interest which any judgment of the Court would nearly or remotely affect. A mere possible interest is not

in general such as will require a party to be joined in the action. When, however, the title to property is sought to be determined by the judgment or decree of the Court, then persons possessing very slight or remote interests should be made parties, as in actions of partition, the foreclosure of mortgage, etc.

6. The next objection, and the fifth ground of demurrer under the statute, is, "that several causes of action have been improperly united." For instance, an action for damages for personal injury cannot be united with an action on account; nor can an action to quiet title, or in ejectment, or any other action affecting real property, be united with a simple *assumpsit*. In general, under the liberal provisions of our statute, different causes of action may be united when they belong to the same class or species of injuries or wrongs, or when they arise out of the same transaction. For examples, consult vol. i., p. 171 *et seq.*

7. But, admitting that the action is brought in the right court, that the parties plaintiff have the right to sue, and that it is brought by the proper parties, and that no other action is pending between these parties, still, the sixth ground of demurrer under the statute, and the one most often interposed, is, "That the complaint does not state facts sufficient to constitute a cause of action." Thus, where the complaint shows upon its face, in an action on account, that it accrued more than two years before the commencement of the suit, or in an action of ejectment, a seizin and ouster are alleged to have occurred more than five years before the commencement of the action, in each case the complaint would fail to state a cause of action because of the bar of the Statute of Limitations. The instances where a plaintiff would fail to state facts sufficient to constitute a cause of action are so numerous that examples seem unnecessary. The following inquiries, however, may be a guide to the practitioner on the subject: First, Does the complaint show that the plaintiff has suffered an injury? Second, Is it an injury which the law recognizes as a wrong, and for which it provides a remedy? Third, Is the defendant liable for the alleged wrong done? Fourth, If the defendant is liable, to what extent is he liable, and what will be the legal remedy for such injury? These questions will,

in general, test the validity of the pleading. Any person may know that an answer must be made to a complaint, but it frequently requires the most careful and critical thought to tell when it may be successfully demurred to. The answer puts in issue the facts, while the demurrer puts in issue the law. The one denies the allegations of the complaint; the other admits, but avoids them, by affirming that no wrong was done the plaintiff by the defendant. By wrong is meant no wrong for which the law affords a remedy.

8. The seventh and last ground of demurrer prescribed by our statute goes more to the manner than the matter of the complaint, namely, that the complaint is ambiguous, unintelligible, or uncertain. For instance, a complainant might have a perfect cause of action, and might also state facts in his pleading "sufficient to constitute a cause of action," but he may so intermingle them with extraneous matter that the complaint would be meaningless; in other words, "the allegations of the complaint should be so clear and pointed that defendant may know what he is charged with, and what he must admit or deny." A defendant, under our practice, is not obliged to look through pages of meaningless sentences to find out the idea of the pleader.

MODE OF TAKING OBJECTION.

9. By the former chancery practice, the proper mode of taking advantage of any ground of defense, apparent from the bill itself, either from its contents or from defect in its frame, or in the case made by it, was by demurrer: 1 Mitf. Eq. Pl. 107; 1 Barb. Ch. Pr. 105. The difference in the modern practice is that objection cannot now be taken by demurrer to the frame or form of the bill; the remedy is by motion to make definite: *Howell v. Frazer*, 1 Code R. (N. S.) 270. Objections by demurrer, may be taken within the time prescribed by the statute for answering the complaint, that is to say: First, If service of summons is had in the county where the action is brought, within ten days after such service; Second, If defendant is served out of the county in which action is brought, but in the district, twenty days; Third, If served anywhere else in the state, forty days: See sec. 407, Cal. Code C. P. If service is had by publication, the defendant has forty days to answer after

the period for publication expires: See sec. 413, Cal. Code C. P.

10. The demurrer shall be filed with the clerk, and a copy thereof served on the adverse party or his attorney: Cal. Code C. P., sec. 455. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer: *De Boom v. Priestly*, 1 Cal. 206; *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495; *Barada v. Inhabitants of Carondelet*, 8 Mo. 644. The omission of the defendant to join in a demurrer to a plea is a waiver of that plea: *Morsell v. Hall*, 13 How. U. S. 212. If demurrers are suffered to rest for three years, the court may then overrule them in its discretion, for want of prosecution, *Anderson v. Fisk*, 36 Cal. 625.

11. A statement of facts in a demurrer is not admissible. The only office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to: *Brennan v. Ford*, 46 Cal. 7; *Brooks v. Gibbons*, 4 Paige, 374. If it requires the slightest statement of facts to make the defect in the complaint apparent, demurrer will not lie: *Davy v. Betts*, 23 How. Pr. 396; *Dillaye v. Wilson*, 43 Barb. 291. The test of a demurrer is: Does it require any facts to sustain it? *Struver v. Ocean Ins. Co.*, 16 How. Pr. 422.

12. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action: Cal. Code C. P., sec. 434. As to waiver of objection to the complaint on special grounds by the omission to demur, see *Malone v. Stillwell*, 15 Abb. Pr. 421. A demurrer abandoned after service of an amended pleading, is no longer a part of the record, and will be struck out of the appeal book on motion: *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495. In a case brought upon a writ of error, which presented the appearance of a demurrer upon the record which had not been disposed of, where there was a verdict upon a plea of the general issue, and a judgment rendered thereon, the Supreme Court presumed that the demurrer had been either withdrawn or overruled: *Townsend v. Jemison*, 7 How. U. S. 706.

13. Notwithstanding a defendant in chancery demurs, and

it is overruled, he may afterwards insist upon the same thing by his answer: see *Crawford v. The "William Penn,"* 3 Wash. C. Ct. 484. And under the civil law, the party who demurred is not prevented from contesting the facts confessed in the demurrer, and compelling the opposite party to prove them: *Id.* This is the modern practice.

WHAT A DEMURRER ADMITS.

14. A demurrer admits the matter of fact, since it refers the law arising upon the fact to the judgment of the court; and therefore the fact is taken to be true on such demurrer, or otherwise the court has no foundation on which to make any judgment: *Tomlins' Law Dict.* But only such facts as are issuable and well pleaded are admitted: *Branham v. Mayor, etc., of San Jose*, 24 Cal. 602. This case, however, involved only the former, the question being whether the demurrer admitted a statement in the complaint which was a mere conclusion of law. It was undoubtedly the rule at common law that a demurrer admitted only facts well or formally pleaded, but by statute, a general demurrer confesses all matters pleaded, though informally: See *Stephen on Pl.*, 159, 160. But a special demurrer admits only facts well pleaded: *Id.* Irrelevant facts are not admitted: *Hall v. Bartlett*, 9 Barb. 297. Where the pleading demurred to contains two contradictory averments, one of which the law adjudges to be a fiction, the demurrer only admits the averment which the law adjudges to be true: *Freeman v. Frank*, 10 Abb. Pr. R. 370; see generally, *Commonwealth, etc., v. Commissioners*, 37 Penn. St. 277; *Bennion v. Davidson*, 1 Horn & Hurl. 48; *Freeman v. Frank*, 10 Abb. Pr. 370; *Cutler v. Wright*, 21 N. Y. 472; *Greathouse v. Dunlap*, 3 McLean C. Ct. 303; *Commercial Bank of Manchester v. Buckner*, 20 How. U. S. 108; *Van Doren v. Tjader*, 1 Nev. 380; *Griffing v. Gibb*, 2 Black, 519; *Foot v. Linck*, 5 McLean, 616. It admits the allegations of the bill, for the purposes of a motion on the bill: *Bayerque v. Cohen*, 1 McAll. 113.

15. Where the Court intimates that conceding the facts to be true, yet the plaintiff could not recover, and the defendant admits the facts could be proved, this is deciding the case as on demurrer, or as on motion for nonsuit: *Snodgrass v. Rickets*, 13 Cal. 359. But an admission of facts by

a demurrer in one cause is not evidence of those facts in another cause, although between the same parties: *Auld v. Hepburn*, 1 Cranch C. Ct. 122, 166. So, a demurrer does not admit the truth of any new facts not appearing in the original pleading: *Van Doren v. Tjader*, 1 Nev. 380. And it never admits the law arising on those facts: *United States v. Arnold*, 1 Gall. 348; *Hobson v. McArthur*, 3 McLean, 241; *Griggs v. St. Paul*, 9 Minn. 246.

WHEN A DEMURRER LIES.

16. A demurrer lies only when an entire pleading, that is an entire cause of action, is insufficient: 1 Van. Santv. 184; as a part of a cause of action cannot be demurred to: *Lord v. Vreeland*, 15 Abb. Pr. 122; *Wait v. Ferguson*, 14 Abb. Pr. 379; *Mattoon v. Baker*, 24 How. Pr. 329; *Hayden v. Anderson*, 17 Iowa, 158. So, if any part of a bill demurred to is good, demurrer to the whole cannot be sustained: 6 Paige, 570; Story's Eq. Pl. sec. 443; *Whiting v. Heslep*, 4 Cal. 327; *Weaver v. Conger*, 10 Cal. 233; *Martin v. Mattison*, 8 Abb. Pr. 3; *Atwill v. Ferrett*, 2 Blatchf. 39; *Marshall v. Bouldin*, 8 Mo. 244; *Butler v. Wood*, 10 How. Pr. 222; *Cooper v. Clason*, 1 Code R. (N. S.) 347; *Souza v. Belcher*, 3 Edw. Ch. 117; *Livingston v. Story*, 9 Pet. 632; *Livingston v. Livingston*, 4 John. Ch. 294; *Higinbotham v. Burnet*, 5 Id. 184; *Parsons v. Bowne*, 7 Paige, 354; *Griggs v. Thompson*, 1 Ga. Decis. 146; *Hollsclaw v. Johnson*, 2 Id. 146; *Jaques v. Morris*, 2 E. D. Smith, 639; *Fancher v. Ingraham*, 6 Blackf. 139. If the complaint contains one good cause of action a general demurrer to the whole complaint will not lie: *Griffiths v. Henderson*, 49 Cal. 566.

17. On a general demurrer (unless for misjoinder of actions,) judgment must be given for the plaintiff, if there is one good count in the declaration: 1 Bos. & Pul. N. R. 43; *Stodlard v. Treadwell*, 26 Cal. 294; *Whitney v. Crosby*, 3 Cai. 89; *Gidney v. Blake*, 11 Johns. 54; *Martin v. Williams*, 13 Id. 264; *Monell v. Colden*, Id. 395; *Mumford v. Fitzhugh*, 18 Id. 457; *People v. Bartow*, 6 Cow. 290; *Freeland v. McCullough*, 1 Den. 414; *Wolfe v. Luyster*, 1 Hall. 146; *Ward v. Sackrider*, 3 Cai. 263; *French v. Tunstall*, Hempst. 204; *McCue v. Corpor. of Wash.*, 3 Cranch C. Ct. 639; *Brown v. Duchesne*, 2 Curt.

C. Ct. 97; *Vermont v. Society for Prop. of Gosp.*, 2 Paine C. Ct. 545.

18. A demurrer should be interposed only to the counts badly pleaded; a general demurrer to the whole will be bad: *Douglass v. Satterlee*, 11 Johns. 16. So, in covenant, where several breaches are assigned, some of which are sufficient and others not, the defendant should only demur to such as are bad; and if he demur to the whole declaration, judgment must be given against him: *Gill v. Stebbins*, 2 Paine, 417. So, a demurrer to a whole complaint is bad if one of the plaintiffs may have judgment separately: *Peabody v. Wash. Co. Mut. Ins. Co.*, 20 Barb. 339. Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an accounting as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint: *Held*, that the demurrer must be overruled: *Young v. Pearson*, 1 Cal. 448.

19. Where a demurrer is too general, it will be overruled: *Young v. Pearson*, 1 Cal. 448; *People v. Morrill*, 26 Id. 361; *Stoddard v. Treadwell*, Id. 294. But in our practice this is not necessary where the demurrer is interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. If a demurrer is to the whole bill, and is good as to a part, but bad as to part, it should be overruled: *People v. Morrill*, 26 Cal. 360. For a demurrer bad in part is bad *in toto*: *Verplank v. Caines*, 1 Johns. C. R. 57; *Le Fort v. Delafield*, 3 Edw. Ch. 32; *Thompson v. Newlin*, 3 Ired. Ch. 338; *Russell v. Lanier*, 4 Hay. (Tenn.) 289; *Kimberly v. Sells*, 3 John. C. R. 467.

20. Where the complaint counts upon two promises, the promise to pay costs and damages, and the promise to pay the value of the use and occupation of the premises, and the objections taken by demurrer to the whole complaint were: First, That the complaint does not state facts sufficient to constitute a cause of action; Second, That the complaint is ambiguous, unintelligible and uncertain, and under the first cause a multitude of supposed defects were specified, and under the last none were specified, the demurrer was properly overruled: *Murdock v. Brooks*, 38 Cal. 600.

WHEN DEMURRER WILL NOT LIE.

21. The mistake of the pleader in setting forth the facts constituting a single cause of action in two separate statements, some facts in one and some in another, as constituting separate causes of action, does not render the pleading demurrable: *Hillman v. Hillman*, 14 How. Pr. 456; see *Lackey v. Vanderbilt*, 10 Id. 155. Nor will a demurrer lie to a complaint for the defect of not separately stating two or more causes of action; they being such as might be united in one complaint, if properly stated: *Moore v. Smith*, 10 How. Pr. 361; *Harsen v. Bayaud*, 5 Duer, 656; *Gooding v. McAlister*, 9 How. Pr. 123; *Welles v. Webster*, Id. 251; *Robinson v. Judd*, Id. 378; *Peckham v. Smith*, Id. 436; *Benedict v. Seymour*, 6 Id. 198; *Waller v. Raskan*, 12 Id. 28; *Cheney v. Fisk*, 22 Id. 236; *Township of Hartford v. Bennett*, 10 Ohio St. 441; *Dorman v. Kellam*, 4 Abb. Pr. 202; *Badger v. Benedict*, Id. 176.

22. Where the complaint in but one count states facts constituting two or more causes of action, or the relief claimed is beyond that authorized by the facts, the remedy is by motion to strike out, not by demurrer: *Fickett v. Brice*, 22 How. Pr. 194; *Lord v. Vreeland*, 13 Abb. Pr. 195; 24 How. Pr. 316. So, if some of the breaches in a count demurred to are good, a demurrer will not lie: *Hayden v. Sample*, 10 Mo. 215; *State v. Campbell*, Id. 724; *Glover v. Tuck*, 24 Wend. 153; *Martin v. Williams*, 13 Id. 264; *People v. Russell*, 4 Wend. 570; Though separate demurrers might be interposed to the several causes of action contained in a complaint: *Ogdensburg Bk. v. Paige*, 2 Code R. 75.

23. What a demurrer to a bill in equity is, and why it cannot be sustained where the facts, as stated on the face of the bill, entitle plaintiffs to relief: see 11 Barb. 293; 8 How. Pr. 177; 1 Duer, 707; Id. 243; see *Griffing v. Gibb*, 2 Black, 519; *Grain v. Aldrich*, 38 Cal. 514; *White v. Lyons*, 42 Id. 279. If the facts stated in a complaint constitute a valid and sufficient cause of action, though other and unnecessary, immaterial, or redundant statements be contained in it, a demurrer will not lie: *Loomis v. Youle*, 1 Minn. 177; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *School Dist. v. Pratt*, 17 Iowa, 16. Such objections are remedied by motion: *Byington v.*

Robertson, Id. 562; *Morse v. Gilman*, 16 Wis. 504; *Chesbrough v. N. Y. and Erie R. R. Co.*, 13 How. Pr. 557; *Graham v. Camman*, Id. 360; *People ex rel. Crane v. Ryder*, 2 Kern. 433.

23. In New York, a demurrer will not lie for irrelevancy or redundancy: *Consult Village of Warren v. Phelps*, 30 Barb. 646; *Watson v. Husson*, 1 Duer, 242; *Spies v. Access Trans. Co.*, 5 Id. 663; *Roeder v. Ormsby*, 13 Abb. Pr. 334; *Seely v. Engell*, 3 Kern. 542; *Smith v. Greenin*, 2 Sandf. 702; *Richards v. Edick*, 17 Barb. 261; *Hammond v. Huds. Riv. Iron and Machine Co.*, 20 Barb. 386; *Lee B'k v. Kilching*, 11 Abb. Pr. 435; see *Anon.*, 11 Abb. Pr. 231. So, it will not lie for argumentativeness: *Brown v. Richardson*, 20 N. Y. 474; *Zabriskie v. Smith*, 3 Kern. 330; *Prindle v. Caruthers*, 15 N. Y. 431; *Judah v. Vincennes University*, 23 Ind. 273.

24. A mere clerical error in a complaint, *e. g.*, the omission in a complaint against two defendants of the letter "s" in the word "defendants," will not sustain a demurrer: *Chamberlin v. Kaylor*, 2 E. D. Smith, 134. Or if the Christian name of one of the plaintiffs does not appear, it is no ground of demurrer: *Nelson v. Highland*, 13 Cal. 74.

25. If the complaint shows damage, it is not a ground of demurrer that it does not show the amount of damages. The amount of damages is never the subject of demurrer: *Pevey v. Sleight*, 1 Wend. 518; *Hecker v. DeGroot*, 15 How. Pr. 314. A demurrer does not raise the objection that the complaint does not show a cause of action for so large a sum as that demanded. Though it seems the demurrer in such case is not frivolous: *Witherhead v. Allen*, 23 Barb. 661. In an action for the breach of a contract, the want of any averment of special damage cannot be reached by a demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of contract an action lies, though no actual damage be sustained: *McCarty v. Beach*, 10 Cal. 461; *Hewitt v. Mason*, 24 How. Pr. 366.

26. The objection that a deed was not signed and acknowledged by a married woman, as required by law, cannot be raised by demurrer, where the complaint alleges that she signed and delivered such deed: *Kays v. Phelan*, 19 Cal. 128. Nor that a bond signed by two, has but one seal, for the party who has not actually signed and sealed the

bond, may specifically plead *non est factum*, under oath: *Smith v. Hart*, 1 Mo. 273. Although such plea would not avail under the California decisions.

27. A demurrer to evidence is not a good plea to a bill in equity, on the ground of its extending beyond the allegations contained in the bill: *Blackburn v. Stannard*, 5 Law Rep. 250. So the insertion of interrogatories in a complaint, after the mode of a bill of discovery, is not a ground for demurrer: *Bank of British North America v. Suydam*, 6 How. Pr. 379.

28. It cannot be objected on demurrer to a declaration, alleging fraudulent misrepresentations, that the representations were made as a matter of opinion: *Whitton v. Goddard*, 36 Vt. 730. A demurrer to a bill, which contains allegations of fraud, and strong circumstances of equity, must be overruled. In such case, the defendant must answer to the fraud: *Burnley v. Town of Jeffersonville*, 3 McLean, 336.

29. Nor is the omission of pledges of prosecution in the complaint a ground for demurrer, they being mere matters of form: *Baker v. Phillips*, 4 Johns. 190. The want of affidavit to a plea is not, in Missouri, a ground for demurrer: *Parker v. Simpson*, 1 Mo. 539. The objection to the want of verification of the complaint, where verification is required by statute, must be taken either before answer or with the answer: *Greenfield v. Steamer "Gunnell,"* 6 Cal. 67. It has been held that it should be taken by motion when the respondents appear: *Woodworth v. Edwards*, 3 Woodb. & M. 120.

OBJECTIONS TO PRAYER FOR RELIEF.

30. Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause when an answer is filed. The facts in the complaint, and not the prayer, settle the relief to be granted: *Rollins v. Forbes*, 10 Cal. 299; *People v. Morrill*, 26 Cal. 336; cited in *Althof v. Conheim*, 38 Id. 234; *Stewart v. Hutchinson*, 29 How. Pr. 181. Nor will demurrer lie to the demand for more relief than the plaintiff is entitled to: *Rollins v. Forbes*, 10 Cal. 299; *Andrews v.*

Shaffer, 12 How. Pr. 443; *Beale v. Hayes*, 5 Sandf. 640; *Emery v. Pease*, 20 N. Y. 62; *Moran v. Anderson*, 1 Abb. Pr. 288; *Moses v. Walker*, 2 Hilt. 536; *Stuyvesant v. Mayor of N. Y.*, 11 Paige, 415; *Woodgate v. Fleet*, 9 Abb. Pr. 222.

31. If the complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind, or how much relief shall be granted to him, cannot be made on demurrer: *Poelt v. Stearns*, 28 Cal. 226. But if the complaint does not state facts sufficient to enable the plaintiff to recover any part of the relief demanded, it is demurrable, though he would from the facts be entitled to other relief: *Walton v. Walton*, 32 Barb. 203; S. C., 20 How. Pr. 347.

32. A demurrer to a complaint, on the ground that it seeks a remedy at law, and also seeks for equitable relief, is bad: *Gates v. Kieff*, 7 Cal. 125; *Rollins v. Forbes*, 10 Id. 300. A demurrer to a bill in equity alleging that the relief can be had at law, will not lie where the bill charges fraud, and prays relief against a judgment at law, and a sale under it: *Shelton v. Tiffin*, 6 How. U. S. 163.

GENERAL DEMURRER.

33. In Pennsylvania it has been held that a general demurrer is only for defects of substance; a special demurrer for defects of form, which must be specially assigned: *Commonwealth v. Cross Cut R. R.*, 53 Penn. 62. A general demurrer, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer: *Tyler v. Hand*, 7 Howard U. S. 573.

Section 431, Cal. Code C. P., provides that the demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken, and unless it does so, it may be disregarded; but this provision, as we shall hereafter see, does not in fact change the force and effect of a general demurrer, or the mode of framing it, since under sec. 434 it is provided that a failure to demur to the jurisdiction or upon the ground that the complaint does not state facts sufficient to constitute a cause of action, does not waive either objection. This must be so independently of this provision, since if the court has not jurisdiction, it cannot render a valid judgment, nor could a judgment be sus-

tained upon the record if it did not disclose facts to sustain the judgment.

34. On demurrer, the court should not pay any attention to forms, if it can find in the complaint any allegations which, under any view of them, may give the plaintiff a right to recover: *Wilder v. McCormick*, 2 Blatchf. C. Ct. 31; *Butterworth v. O'Brien*, 39 Barb. 192; S. C., 24 Howard Pr. 438. Or if the complaint contains the elements of a cause of action, however inartificially it may be stated, and if, on analyzing the facts disclosed, the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled: *People v. Mayor of N. Y.*, 28 Barb. 240; S. C., 8 Abb. Pr. 7; *Buzzard v. Knapp*, 12 How. Pr. 504.

35. If the declaration does not set forth a proper case, and in a correct form, the defendant may avail himself of these defects on demurrer; but the want of proper averments in the declaration cannot be made the ground of a nonsuit: *Bas v. Steel*, Pet. C. Ct. 406. For defects in mere matters of form in a pleading, the adverse party should interpose a special demurrer. A general demurrer will not in general reach them: *Childress v. Emory*, 8 Wheat. 642; *Christmas v. Russell*, 5 Wall. 290; compare *Lockington v. Smith*, Pet. C. Ct. 466. But these questions are regulated by the decisions of the courts in the several states, and the statutes in force.

36. A general demurrer to a plea of fraud in obtaining the judgment in suit is insufficient where the objection intended to be raised is that the plea does not state the particulars of the fraud relied upon; this being matter of form: *Christmas v. Russell*, 5 Wall. 290. In California it is held, that an averment in a complaint that the defendant unlawfully took personal property, is a mere averment of law, and an averment that he fraudulently took it without stating the facts which constitute the fraud, is not a statement of an issuable fact: *Triscony v. Orr*, 49 Cal. 612.

SPECIAL DEMURRERS.

37. The phrase "special demurrer," doubtless means a demurrer which specifies the grounds upon which objections are taken: *Drais v. Hogan*, 50 Cal. 127. At common law and in the old equity practice, a special demurrer should

point out, specifically, by paragraph, page, or folio, or other mode of reference, the parts of the bill to which it is intended to apply: 2 Ves. & B. 118; Id. 121; 2 Sch. & Lef. 199; Story Eq. Plead., sec. 457; *Atwill v. Ferrett*, 2 Blatchf. 39; *Jarvis v. Palmer*, 11 Paige, 650; *Kuypers v. Ref. Dutch Church*, 6 Paige, 570.

38. It must specify the grounds upon which any of the objections to the complaint are taken: Stat. of Oregon, sec. 67; *Harper v. Chamberlain*, 11 Abb. Pr. 234. And if it omit such specifications, it may be disregarded: Sec. 431 Cal. C. P.; N. Y. Code, sec. 490. This must be done in all cases, except: First, When objection is raised to the jurisdiction of the court; and, Second, When the ground is that the complaint does not state facts sufficient to constitute a cause of action: *Kent v. Snyder*, 30 Cal. 666; see *Anibal v. Hunter*, 6 How. Pr. 255; *Durkee v. Saratoga R. R. Co.*, 4 Id. 226; *Hinds v. Tweddle*, 7 Id. 278; *Haire v. Baker*, 1 Seld. 357; *Johnson v. Wetmore*, 12 Barb. 433; *Skinner v. Stuart*, 13 Abb. Pr. 457; *Viburt v. Frost*, 3 Id. 120; *Hobart v. Frost*, 5 Duer, 672; *Nash v. Smith*, 6 Conn. 421.

39. A special demurrer is distinguished from a general demurrer by pointing out specially the causes for it: *Steamboat Reveille v. Case*, 9 Mo. 498; *Jackson v. Rundlet*, 1 Woodb. & M. 381. As to when it lies, and its effect, see *Whetcroft v. Dunlop*, 1 Cranch C. Ct. 5; *Vowell v. Lyles*, Id. 428; *McCue v. Corporation of Wash.*, 3 Id. 639; *Malone v. Stillwell*, 15 Abb. Pr. 421; *Nellis v. De Forest*, 16 Barb. 65; *Chandler v. Byrd*, Hempst. 222; *Cage v. Jeffries*, Id. 409.

40. A demurrer to one of two counts may be sustained, and judgment be entered on the other against defendant: *Barber v. Cazalis*, 30 Cal. 92. But a demurrer for a misjoinder of counts, must be to the whole declaration: 1 Chitt. Pl. 180; *Ferriss v. N. A. Fire Ins. Co.*, 1 Hill, 71. And the cause of demurrer must be specially assigned: *Owsley v. Montgomery & W. P. R. R. Co.*, 37 Ala. 560.

CAUSES OR GROUNDS FOR DEMURRER.

41. There are seven causes for which a demurrer may be interposed, under section 430 of the Cal. Code C. P. Unless a ground of demurrer be included under one or more of such causes, it cannot be sustained: *Hentsch v. Porter*, 10

Cal. 555; *Harper v. Chamberlain*, 11 Abb. Pr. 232. A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer: *Hentsch v. Porter*, 10 Cal. 555. The demurrer is good if it assigns the grounds of objection substantially as they are defined in the statute: *Lagow v. Neilson*, 10 Ind. 183; *De Witt v. Swift*, 3 How. Pr. 280; but see Cal. Code C. P., sec. 431, and *Ellisen v. Halleck*, 6 Cal. 386.

42. A demurrer will lie only when one of the several grounds of demurrer is apparent on the face of the complaint: *Simpson v. Loft*, 8 How. Pr. 234; *Getty v. Hudson Riv. R. R. Co.*, 8 How. Pr. 177; *Wilson v. Mayor of N. Y.*, 6 Abb. Pr. 6; 4 E. D. Smith, 675; 15 How. Pr. 500; *Coe v. Beckwith*, 31 Barb. 339; *Mayberry v. Kelly*, 1 Kansas, 116; *Union Mut. Ins. Co. v. Osgood*, 1 Duer, 707; *Aurora v. Cobb*, 21 Ind. 492; *Kenworthy v. Williams*, 5 Id. 375; *Davy v. Betts*, 23 How. Pr. 396; *Dillaye v. Wilson*, 43 Barb. 261; *Bell v. Mayor of Vicksburg*, 23 How. U. S. 443; *Amory v. McGregor*, 12 Johns. 287; *Powers v. Ames*, 9 Min. 178. And defendant is confined to the objections specified: *Loomis v. Tift*, 16 Barb. 541.

CHAPTER II.

FORMS OF DEMURRERS.

"The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

"1. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

"2. That the plaintiff has not legal capacity to sue; or,

"3. That there is another action pending between the same parties for the same cause; or,

"4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

"5. That several causes of action have been improperly united; or,

"6. That the complaint does not state facts sufficient to constitute a cause of action; or,

“7. That the complaint is ambiguous, unintelligible, or uncertain:” Cal. Code C. P., sec. 430.

“The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may answer or demur at the same time:” Id., sec. 431.

“When any of the matters enumerated in section 430, do not appear upon the face of the complaint, the objection may be taken by answer:” Id. sec. 433.

“If no such objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.” Id. sec. 434.

No. 545.

i. Demurrer to Some of Several Causes of Action, and to the Whole Complaint.

[TITLE.]

I. The defendant demurs to the first cause of action stated in the complaint in this cause upon the following grounds:

1. That said first alleged cause of action does not state facts sufficient to constitute a cause of action.

2. That said first alleged cause of action is ambiguous, unintelligible, and uncertain in this [state particularly wherein it is ambiguous, etc.]

II. The defendant also demurs to the third cause of action in said complaint contained, upon the ground that [state any ground of demurrer applicable to the cause of action, or as many grounds as there may be.]

III. The defendant also demurs to the whole complaint in this cause upon the grounds following:

1. That several causes of action have been improperly united therein. [State wherein the joinder is improper.]

2. [State any other ground of demurrer applicable to the whole complaint.]

NOTE.—If there are several causes of action in the complaint, and a demurrer is interposed to one or more, but not to each, the defendant should take care to avoid a default as to the causes of action not demurred to. In

such case he may stipulate for time to answer such causes of action until the demurrer is disposed of to the other causes of action, or he may answer them at the same time that he files his demurer. If there is ground of demurer to the whole complaint, and a demurrer is interposed thereto, as there may be, notwithstanding there is one good cause of action, that would, of course, save any default being taken.

1. Several Causes of Action.—If a complaint containing several causes of action is demurred to, on the ground that the several counts do not state facts sufficient to constitute a cause of action, the demurrer must be overruled, unless all the statements are insufficient: *Martin v. Mattison*, 8 Abb. Pr. 3; *Butler v. Wood*, 10 How. Pr. 222; *Newbery v. Garland*, 31 Barb. 121; *Jacques v. Morris*, 2 E. D. Smith, 639; *Cooper v. Clason*, 1 C. R. (N. S.) 347; *Townsend v. Jemison*; 7 How. U. S. 706.

No. 546.

ii. *On the Ground of Want of Jurisdiction.*

[TITLE.]

The defendant demurs to the complaint filed herein, and for cause of demurrer alleges:

I. That the Court has no jurisdiction of the person of the defendant [or of the subject-matter of the action—state why].

2. Definition of Terms.—The meaning of the clause “that the court has no jurisdiction of the person” is that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the remedy of the defendant is by motion against the irregularity: *Nones v. Hope Mut. Life Ins. Co.*, 8 Barb. 541. Jurisdiction is the power to hear and determine the controversy brought before the court: *C. P. R. R. Co. v. Placer County*, 43 Cal. 365. Jurisdiction is the power to hear and determine, or to hear without determining, or to determine without hearing: *Ex parte Bennett*, 44 Id. 85.

3. Demurrer Lies.—In the case of *Doll v. Feller*, 16 Cal. 432, it was held that “a demurrer to the jurisdiction of the court only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In a court of limited and special jurisdiction the rule is otherwise.” See *Wilson v. Mayor of New York*, 6 Abb. Pr. 6; 15 How. Pr. 500; *Kœnig v. Nott*, 8 Abb. Pr. 384.

4. Jurisdiction.—A justice’s court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments: *Jolley v. Foltz*, 34 Cal. 321; *Winter v. Fitzpatrick*, 35 Id. 269. Where an inferior tribunal, as the board of land commissioners, has once acquired jurisdiction of a matter, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity: *Bernal v. Lynch*, 36 Cal. 135.

5. Jurisdiction of Person.—There are two modes of acquiring jurisdiction of the person: First, By personal service of the summons, and copy of complaint; and, Second, By constructive service, or by what is commonly

called publication of summons: *Hahn v. Kelley*, 34 Cal. 391. Where S. and B. admitted "due service" in an action against them and others, the court thereby acquired jurisdiction of them: *Sharp v. Brunnings*, 35 Cal. 528.

6. Power of Determination.—The court whose jurisdiction is impeached has power to determine the question whether it possesses it or not: *King v. Poole*, 36 Barb. 242.

7. Several Causes of Action.—Where there are several causes of action, but of one of them the court has no jurisdiction, the demurrer must be to that one, and in this form, and not to the whole complaint, as for a misjoinder of actions: *Cook v. Chase*, 3 Duer, 643.

8. Statement of Grounds.—A demurrer on the ground "that the court has no jurisdiction either of the person of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit under the rule of construction adopted by the courts of this state: *Elissen v. Halleck*, 6 Cal. 386; *Willis v. Farley*, 24 Id. 491; *Kent v. Snyder*, 30 Id. 666; and see Cal. Code C. P., sec. 434. Objection to the jurisdiction may be raised whenever the parties are before the court, either at special term, or by motion on the trial, or by motion in arrest after verdict: *Burnham v. De Bevoise*, 8 How. Pr. 160; see, also, 2 Duer, 653; 3 Seld. 404; 19 Barb. 186.

No. 547.

iii. *On the Ground of Want of Capacity to Sue.*

[TITLE.]

The defendant demurs to the complaint filed herein, and for cause of demurrer alleges:

That the plaintiff has not legal capacity to sue [state reason why].

9. Company—Membership.—The failure to aver membership in a company in the body of the complaint is a ground for demurrer: *Tolmie v. Dean*, Wash. Ter. 61.

10. County.—A county has legal capacity to sue: *Placer County v. Asten*, 8 Cal. 305. The statute provides that no person shall sue a county, unless the claim has been first presented to the board of supervisors, and been by them rejected; this fact must appear in the complaint, or it is demurrable: *McCann v. Sierra County*, 7 Cal. 123.

11. Corporation.—The omission on the part of a corporation plaintiff to show their incorporation cannot be reached by a general demurrer, based upon the ground that the complaint does not state facts sufficient to constitute a cause of action. That the plaintiff has not legal capacity to sue is made a ground for special demurrer, and must, therefore, be specially assigned: *Bank of Lowville v. Edwards*, 11 How. Pr. 216. Where a corporation sues, it must show how it was created; without this, there is a fatal omission of one of the material elements of a good cause of action: *Johnson v. Kemp*, Id. 186.

12. Defect Must be Apparent.—Ground of demurrer for want of capacity to sue must appear from allegation as made, not from want of allegation: *Phenix Bank of N. Y. v. Donnell*, 41 Barb. 571; affirmed 40 N. Y. 410.

13. Foreign State.—Demurrer allowed to a bill brought by “the United States of America,” on the ground that a foreign state is not allowed to sue in a court of equity, without putting forward some public officer on whom process may be served, and who can be called upon to give discovery on a cross-bill: *United States of America v. Wagner*, Law Rep. 3 Eq. 724.

14. Guardian of Infant.—A complaint omitting to allege the appointment of a guardian for an infant plaintiff is impeachable under this subdivision: *Grantman v. Thrall*, 44 Barb. 173.

15. Note Held in Trust.—A plaintiff has no legal capacity to sue in an action on a promissory note, when it appears on the face of the complaint that plaintiff holds the note as collateral security for a debt, under a trust to sell it, but with no power to sue: *Nelson v. Eaton*, 7 Abb. Pr. 305; reversing 15 How. Pr. 305.

16. Objection Waived.—The objection that plaintiff has not legal capacity to sue is waived if not taken by demurrer or answer: *Palmer v. Davis*, 28 N. Y. 242; *Hastings v. McKinley*, 1 E. D. Smith, 273. So held when the objection was that plaintiff was a married woman, suing without a next friend, before the act of 1857: *Palmer v. Davis*, 28 N. Y. 242. So held when the objection was that plaintiff was a foreign executor: *Robbins v. Wells*, 26 How. Pr. 15. So held in an action brought by a husband and wife to recover possession of land, when plaintiffs claimed as owners in right of the wife, and on the trial, the defendants relied on an appointment by the husband and wife, under an ante-nuptial agreement between them, of a trustee for the property and effects of the wife: *Van Amringe v. Barnett*, 8 Bosw. 357.

17. Receiver.—A demurrer on the ground that it does not appear that plaintiff had any title to the note sued on, is insufficient to raise the question as to his right to sue as receiver: *White v. Low*, 7 Barb. 204. Where a complaint by a receiver alleges that he was duly appointed receiver, but does not state facts from which the court can see that he was so appointed, the proper remedy is by motion to make more definite and certain: *Cheney v. Fisk*, 22 How. Pr. 236.

18. Statement of Grounds.—Where the demurrer specified as the ground of the demurrer that the complaint did not state facts sufficient to constitute a cause of action, among other things that it did not show plaintiff's capacity to sue: *Held*, a sufficient demurrer to that point: *Conn. Bank v. Smith*, 9 Abb. Pr. 168; 17 How. Pr. 487. The facts showing the capacity of the plaintiff to sue are not facts constituting the cause of action: *B'k of Lowville v. Edwards*, 11 How. Pr. 216; *Vibert v. Frost*, 3 Abb. Pr. 120; *Myers v. Machado*, 6 Abb. Pr. 198; *Hobart v. Frost*, 5 Duer, 672.

No. 548.

iv. On the Ground of Another Action Pending.

[TITLE.]

The defendant demurs to the complaint filed in this action, and for ground of demurrer alleges:

That it appears upon the face of said complaint that there is another action pending between the same parties for the same cause.

19. Defect must be Apparent.—The fact must appear on the face of the complaint, for even if there is another action pending between the same parties, for the same thing, and the fact does not appear on the face of the complaint, the remedy is by answer, not by demurrer: *Burrows v. Miller*, 5 How. Pr. 51; *Hornfager v. Hornfager*, 1 Code R. (N. S.) 412.

20. Divorce.—Pendency of action for divorce is no cause of demurrer to another for subsequent offenses: *Cordier v. Cordier*, 26 How. Pr. 187.

21. Foreclosure.—In Nevada, where the complaint in foreclosure against the estate of a deceased person shows the fact that the claim had been allowed by the administrator, it is demurrable under this subdivision, as if it alleged a former suit and judgment upon the same claim: *Corbett v. Rice*, 2 Nev. 330.

22. Former Adjudication.—Where a bill disclosed that the subject-matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was held bad on demurrer, and was ordered to be dismissed: *Barnett v. Kilbourne*, 3 Cal. 327. The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action against the steam-tug towing her, for her loss, and his recovery will bar another action for the same cause, and, therefore, the defendant cannot raise the objection that the action is not brought by the real party in interest: *White v. Mary Ann*, 6 Cal. 462.

23. Quieting Title.—In an action to quiet plaintiff's title to land, alleged to be clouded by defendants giving out that the title is in themselves and not in plaintiff, an action of ejectment pending, in which the defendant does not ask for affirmative relief, is not available as a defense: *Ayres v. Bensley*, 32 Cal. 620.

24. Receivers Judgment.—A judgment in favor of a receiver is a bar to a subsequent action in the same cause by the party for whom he was appointed. And a demurrer lies on this subdivision: *Tinkham v. Borst*, 24 How. Pr. 246.

25. What must Appear.—For a demurrer to lie under this subdivision, it must appear that both actions are for the identical cause of action: *Paige v. Wilson*, 8 Bosw. 294; *Kelsey v. Ward*, 16 Abb. Pr. 98.

26. When Demurrer Lies.—A demurrer lies under this subdivision when there is an action between the same parties in any proceeding in which the rights of the plaintiff in the last suit would be fully protected, whether strictly an action, attachment, citation before the surrogate, or a proceeding in court, founded on a petition: *Groshon v. Lyon*, 16 Barb. 461. So, the pendency of another action brought by a defendant in partition would come under the rule: *Hornfager v. Hornfager*, 6 How. Pr. 279. But the general rule is that the plaintiff in the latter action must be the plaintiff in the former in order to sustain this plea: *Walsworth v. Johnson*, 41 Cal. 63; *O'Connor v. Blake*, 29 Cal. 312; *Certain Logs of Mahogany*, 2 Sumn. 593; *Wadleigh v. Feazie*, 3 Sumn. 165. Nor can it be sustained if the other action is for relief, which could not be granted in the action in which the demurrer is interposed: *Haire v. Baker*, 5 N. Y. 357. Nor is it sustained where the other action is in a court of another state or a court of the United States: *Burrows v. Miller*, 5 How. Pr. 51; *Cook v. Litchfield*, 5 Sandf. 330. This objection must be raised under subdivision three. It cannot be raised under subdivision six, assigning for cause the want of sufficient facts: *Aiken v. Bruen*, 21 Ind. 137.

*No. 549.**v. On Ground of Defect of Parties.*

[TITLE.]

The defendant demurs to the complaint and for cause of demurrer alleges:

I. That G. H. should be made a plaintiff in this action [or that L. M. should be made defendant in this action—state why].

27. Cause of Demurrer.—A defect of parties plaintiff is a good cause of demurrer by all the defendants: *Brownson v. Gifford*, 8 How. Pr. 392; *Walroth v. Hamly*, 24 Id. 353. But the fact that the party whose non-joinder is alleged as ground of demurrer, is living, must appear affirmatively on the face of the complaint: *Taylor v. Richards*, 9 Bosw. 679; *Burgess v. Abbot*, 6 Hill, 135, 141; affirming S. C., 1 Id. 476; *State of Indiana v. Woram*, 6 Hill, 33; *Scofield v. Van Syckle*, 23 How. Pr. 97. If the fact does not appear affirmatively, the objection must be taken by answer: *Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Syckle*, 23 How. Pr. 97.

28. Defect of Parties.—It seems that section 122 of the New York Code (to which section 389, Cal. Code C. P., corresponds), is to control in determining whether a demurrer for defect of parties is well taken: *Wallace v. Eaton*, 5 How. Pr. 99. This phrase does not include the joinder of an improper party: *Great West. Comp. Co. v. Etna Ins. Co.*, 40 Wis. 373. Defect means too few, not too many: *Bennett v. Preston*, 17 Ind. 291.

29. Error must be Apparent.—It is not within the office of a demurrer to state objections not apparent upon the face of the complaint, *e. g.*, to name parties who should have been joined; and no conclusion is to be drawn from such statements adverse to the plaintiff: *Coe v. Beckwith*, 10 Abb. Pr. 296.

30. Freight Owners.—Where some of the part owners of a vessel sued to recover freight, and the complaint showed that the plaintiffs owned three eighths of the vessel only, and claimed to recover only their proportion of the freight-money averred to be due: *Held*, that although all the owners should have joined in the action, yet the defendant had waived the objection by omitting to demur to the complaint: *Merritt v. Walsh*, 32 N. Y. 685; followed in *Donnell v. Walsh*, 33 N. Y. 43.

31. Interest of Parties—Where there is a defect of parties, it must appear that the party demurring has an interest in having such other party made a defendant: *Hillman v. Hillman*, 14 How. Pr. 460; *Newbould v. Warren*, 14 Abb. Pr. 80; *Wooster v. Chamberlain*, 28 Barb. 602. Or that he is prejudiced by the non-joinder: *Stockwell v. Wager*, 30 How. Pr. 271.

32. Multifariousness.—Where several parties are joined as plaintiffs, and the issues tendered are simple, a demurrer for multifariousness will not be sustained: *People v. Morrill*, 26 Cal. 336.

33. Non-Joinder of Parties.—Under the New York Code of Procedure, the objection that necessary parties are not joined can only be taken by answer or demurrer: New York Code of Procedure, ed. of 1877, sec. 499. And the same is true under the California Code of Civil Procedure, sec. 434:

Rowe v. Bacigalluppi, 21 Cal. 633; *Hosley v. Black*, 28 N. Y. 438; 26 How. Pr. 97; *Creed v. Hartman*, 29 N. Y. 591; *Lee v. Wilkes*, 27 How. Pr. 336; S. C., 19 Abb. Pr. 355. For example, the non-joinder of a copartner as plaintiff, which is not apparent upon the face of the complaint, can only be taken by answer. And if not thus interposed, it is waived: *Conklin v. Barton*, 43 Barb. 435. Demurrer for non-joinder of state in action against town commissioners, sustained: *Plumtree v. Dratt*, 41 Barb. 333. So, also, for non-joinder of corporation in suit against directors for embezzlement of its assets: *Gardiner v. Pollard*, 10 Bosw. 674.

34. Objection must be Taken.—Although a demurrer to the answer reaches back to the complaint, a defect of parties cannot be taken advantage of in that way. A demurrer to the complaint must be filed: *McEuen v. Hussey*, 23 Ind. 395. An allegation in an answer that the debt sued for, if due at all, is due to plaintiff and another as partners, cannot be treated as a demurrer: *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

35. Objection, how Taken.—The objection to a defect of parties in the complaint, if apparent upon its face, should be taken advantage of by demurrer, or it must be deemed to have been waived at the trial: *Dunn v. Tozer*, 10 Cal. 170; *Burroughs v. Lott*, 19 Id. 125; *Barber v. Reynolds*, 33 Id. 497; *Robinson v. Smith*, 3 Paige Ch. R. 222; *Higgins v. Freeman*, 2 Duer, 650; *Dillaye v. Parks*, 31 Barb. 132; *Wright v. Starrs*, 6 Bosw. 600; *Palmer v. Davis*, 28 N. Y. 242; *Tremper v. Conklin*, 44 Barb. 456; *Soeding v. Bartlett*, 35 Mo. 90.

36. Statement of Grounds.—A demurrer under this subdivision following the words of the code, that there is a defect of parties defendant, is insufficient for not specifying the particular defect: *Skinner v. Stuart*, 13 Abb. Pr. 442. It must show who are the proper parties from the facts stated in the bill; not indeed by name, for that might be impossible; but in such a manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties: Stor. Eq. Pl. 501, sec. 543; *Dias v. Bouchaud*, 10 Paige, 445; *Robinson v. Smith*, 3 Id. 222.

37. Trust Fund.—In an action for the distribution of a fund by a trustee, the absence of necessary parties plaintiff, though demurrable at the time, is a defect cured by failure to respond: *The General Mutual Ins. Co. v. Benson*, 5 Duer, 168.

No. 550.

vi. On Ground of Misjoinder of Parties.

[TITLE.]

The defendant demurs to the complaint, and for cause of demurrer alleges:

I. That I. K. is improperly made plaintiff in said action [or that N. O. is improperly made a defendant in said action—state why].

38. Executor—Misjoinder of.—The executor of an indorser of a promissory note, who as such executor is sued together with the maker, cannot demur to the complaint in such action for a misjoinder of defendants, if the complaint states facts sufficient to constitute a cause of action against him in his representative character: *Churchill v. Trapp*, 3 Abb. Pr. 306.

39. Form of Demurrer.—A demurrer to a complaint on the ground “that the complaint does not state facts sufficient to constitute a cause of action:” *Mann v. Marsh*, 35 Barb. 68; 21 How. Pr. 372; *Walrath v. Handy*, 24 Id. 823, and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties: *Summers v. Farrish*, 10 Cal. 347.

40. Ground for Demurrer.—A misjoinder of parties plaintiff is a ground of demurrer. It is not a ground for nonsuiting such plaintiffs as are entitled to recover: *Rowe v. Bacigalluppi*, 21 Cal. 633; *White v. Delschneider*, 1 Oregon, 254.

41. Husband and Wife.—The misjoinder of husband and wife must be taken advantage of on demurrer: *Tissot v. Throckmorton*, 6 Cal. 471; *Dunderdale v. Grymes*, 16 How. Pr. 195; *Avogardo v. Bull*, 4 E. D. Smith, 384; *Bartow v. Draper*, 5 Duer, 130.

42. Too many Plaintiffs.—The ground of demurrer allowed by the code, “that there is a defect of parties plaintiff or defendant,” does not reach a case where there are too many plaintiffs or too many defendants, but only cases where parties are omitted. It is the same as non-joinder at law, and the omission of a necessary party in equity: *Palmer v. Davis*, 28 N. Y. 242; *Kolls v. De Leyer*, 17 Abb. Pr. 312; S. C., 41 Barb. 208; Id., 26 How. Pr. 468; *Dean v. English*, 18 B. Monr. 132; *Gilman v. Rives*, 10 Pet. 298. So held in the case of a misjoinder of defendants: *N. Y. and N. H. R. R. Co. v. Schuyler*, 7 Abb. Pr. 41; *Manning v. State of Nicaragua*, 14 How. Pr. 517. So held in case of a misjoinder of plaintiffs: *Peabody v. Washington Co. Mut. Ins. Co.*, 20 Barb. 339; followed by *Gregory v. Oaksmith*, 12 How. Pr. 134; *People v. Mayor of N. Y.*, 28 Barb. 24; 8 Abb. Pr. 7. But the contrary to the general proposition of this rule was held in *Leavitt v. Fisher*, 4 Duer, 1; and *Walrath v. Handy*, 24 How. Pr. 353. Where it says that the objection that a complaint contains an excess of parties may be taken by demurrer or answer, and when not so taken is deemed to be waived, supported by *Mann v. Marsh*, 36 Barb. 68.

43. Too many Plaintiffs—California Practice.—By the practice in California, it is, however, well settled, that the objection that too many parties are joined as plaintiffs must be taken advantage of by demurrer, if it appear on the face of the complaint, and if it does not so appear by answer, or the same is waived: *Gillam v. Sigman*, 29 Cal. 637. Denial does not raise issue of misjoinder of plaintiffs. Where two are joined as plaintiffs in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs: Id. Nor can the question of a misjoinder of the parties be raised under a demurrer, interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action: *Tennant v. Pfister*, 51 Cal. 511.

44. Unnecessary Party Defendant.—Where a co-defendant claimed that he was an unnecessary party to a suit, he should have demurred to the petition, and could not in the course of the trial demand that his name be stricken out: *Soeding v. Bartlett*, 35 Mo. 90.

45. Waiver of Objection.—Where plaintiffs offer to strike out such

parties demurred to, and defendant successfully resists: *Held*, that such action on the part of defendants is a waiver of misjoinder: *Summers v. Farrish*, 10 Cal. 347.

No. 551.

vii. *On Ground of Misjoinder of Causes of Action.*

[TITLE.]

The defendant demurs to the complaint, and for cause of demurrer alleges:

That several causes of action have been improperly united [state how].

46. Actions—Legal and Equitable.—At common law, legal and equitable causes of action could not be joined. It is otherwise in California and all the Pacific states and territories, as well as in New York, Ohio, Iowa, and other Eastern states: See Cal. Code C. P., secs. 307 and 427; also *ante* Vol. I pp. 112, 113. The causes of action should be separately stated: *Boles v. Cohen*, 15 Cal. 152; *Natoma Water and M. Co. v. Clarkin*, 14 Id. 547.

47. Actions not Separately Stated.—It seems that in many of the states a demurrer does not lie to a complaint under this subdivision, for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated. In New York the remedy in such case is by motion. See the following authorities: *Badger v. Benedict*, 4 Abb. Pr. 176; 1 Hilt. 415; *Lattin v. McCarty*, 17 How. Pr. 239; *Fickett v. Brice*, 22 Id. 195; *Harsen v. Bayard*, 5 Duer, 656; *Cheney v. Fisk*, 22 How. Pr. 236; *State v. Davis*, 35 Mo. 406; *Township of Hartford v. Bennett*, 10 Ohio, 441. But that a demurrer may be interposed for this cause in California, see 14 Cal. 146; 15 Id. 150. And that it formerly could in New York, see *Acome v. Amer. Min. Co.*, 11 How. Pr. 27; *Strauss v. Parker*, 9 Id. 342; *Van Namee v. Peoble*, 9 Id. 198.

48. Conversion of Chattels.—Where the complaint alleged that defendant had become possessed of a chattel, the property of plaintiff, and wrongfully converted it to his, defendant's use, and then demanded damages for such taking and detention, and a restitution of the chattel: *Held*, demurable for improper joinder of causes of action: *Maxwell v. Farnham*, 7 How. Pr. 236. The objection must be specially assigned as the cause of demurrer: *Washington v. Eames*, 6 Allen, 417.

49. Demurrer Lies.—Demurrer may also be interposed when it appears on the face of the complaint, "that several causes of action have been improperly united." It is one of the leading and distinguishing principles of our statute that litigation must not be conducted by piecemeal, and whenever the difference between the parties arise out of: First. The same transaction; Second. Out of many transactions of like character; Third. When but one kind of relief is prayed for; so that one writ will afford the remedy; a demurrer will not be sustained under this subdivision. By one kind of relief is meant ultimate relief. A remedy at law and equitable relief may be asked for in the same complaint. Thus, A. may sue B. for trespass, and in the same complaint show that the acts of trespass are irreparable, and ask for an injunction: *Gates v. Kieff*, 7 Cal. 124. The writ of injunction is not in such a case

asked for as the ultimate writ in the case, nor for the reason that it will afford the whole of the remedy; but as a protection of the subject-matter of the action pending the litigation. So allegations of fraud in support of the cause of action, and not as constituting a separate cause, do not make improper joinder of actions: *Campbell v. Wright*, 21 How. Pr. 9; *Meyer v. Van Collem*, 7 Abb. Pr. 222; 28 Barb. 230.

50. Demurrer will not Lie.—As to manner of objection to misjoinder of causes of action, see *Smith v. Orser*, 43 Barb. 187; *Malone v. Stillwell*, 15 Abb. Pr. 421. If, in fact, the complaint contains but a single cause of action, although a part of the facts constituting it are set forth, some in one count as constituting one cause of action, and some in another as constituting a separate cause of action, the defendant cannot successfully demur on the ground that the causes of action are improperly united: *Hillman v. Hillman*, 14 How. Pr. 456.

51. Fraudulent Conveyance.—The plaintiff having a claim against A., brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A. to B., on the ground that it was executed in fraud of the creditors of A., and made B. a party to the suit: *Held*, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A. to B.: *Maccondray v. Simmons*, 1 Cal. 393. The demurrer must be entirely sustained or fail to the whole extent to which it is applied: *Peabody v. Mut. Ins. Co.*, 20 Barb. 342; *People v. Mayor of N. Y.*, 17 How. Pr. 57; *Wait v. Ferguson*, 14 Abb. Pr. 387; *Cook v. Chase*, 3 Duer, 643.

52. Husband and Wife.—There is no misjoinder of actions in an action against husband and wife to foreclose a mortgage executed by husband and wife to secure a note given by the husband alone, where the prayer of the complaint was for judgment against the husband, and a decree against the husband and wife for a sale of the premises: *Rollins v. Forbes*, 10 Cal. 299.

53. Injuries to Person and Property.—Injuries to person, resulting from injuries to property, if joined with the latter, is not a misjoinder of causes of action in New York: *Grogan v. Lindeman*, 1 Code R. (N. S.) 287. But the practice differs in California, where such would be a misjoinder and would be demurrable. Especially is this the case unless it arises out of the same transaction: *McCarty v. Fremont*, 23 Cal. 197. Damages for a personal tort cannot be united with claim for equitable relief: *Mayo v. Madden*, 4 Cal. 27. So, a claim for possession of real property and damages for its detention cannot be united with a claim for consequential damages: *Bowles v. Sacramento Turnpike Co.*, 5 Cal. 224. So, a claim in *trespass quare clausum fregit* ejectment and prayer for relief is demurrable. So, where several matters are united against one defendant, perfectly distinct and unconnected, or where relief is demanded against several defendants of matters of a distinct and independent nature: *Wilson v. Castro*, 31 Cal. 420.

54. Joint Demurrer.—If complaint state a cause of action against one, or some of several defendants, a joint demurrer cannot be sustained: *People v. Mayor of N. Y.*, 28 Barb. 240; *Eldridge v. Bell*, 12 How. Pr. 549; *Phillips v. Hagadon*, Id. 17; *Woodbury v. Sackrider*, 2 Abb. Pr. 402. But where complaint disclosed a separate cause of action against each defendant, a joint

demurrer for misjoinder was sustained: *Hess v. Buffalo and Niagara Falls R. R.*, 29 Barb. 391.

55. Objections must be taken.—Objections to the misjoinder of causes of action should be taken by demurrer or answer, or they are deemed waived: *Jacks v. Cooke*, 6 Cal. 164; *Marius v. Bicknell*, 10 Id. 217; Cal. Code C. P., sec. 434; *Jones v. Hughes*, 16 Wis. 683; *Barlow v. Leavitt*, 12 Cush. 483; *Youngs v. Seely*, 12 How. Pr. 395; *White v. Delschneider*, 1 Or. 254. Misjoinder of actions cannot be taken advantage of on general demurrer: *Ruhling v. Hackett*, 1 Nev. 360.

56. Objection, how taken.—A misjoinder of causes of action in a complaint cannot be taken advantage of, unless specially assigned by a demurrer: *Haverstick v. Trudel*, 51 Cal. 431. Where a plaintiff brought eleven *qui tam* actions for penalties against the same defendant, who demurred specially to each declaration, and the plaintiff joined in demurrer, a motion that one demurrer be argued, and that proceedings in the other cases be stayed to abide the event of the one argued, was denied. A party bringing a multiplicity of suits must take the responsibility of meeting them in the usual way: *Ferrett v. Atwill*, 1 Blatchf. 151.

57. Objections Waived.—If two causes of action have been improperly joined without properly stating them, the objection must be taken by demurrer, or it is considered waived: *Fuhn v. Weber*, 38 Cal. 636.

58. Parties.—Where there is a misjoinder of causes of action, any defendant may demur; but where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur: *Ashby v. Winston*, 26 Mo. 210. Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained: *People v. Morrill*, 26 Cal. 360; *Garner v. Wright*, 28 How. Pr. 92.

59. Penalties.—The plaintiff cannot unite in his complaint two or more causes of action for penalties incurred by a toll gatherer for demanding and receiving too much toll, even if they are separately stated: *Brown v. Rice*, 51 Cal. 489.

60. Recognizance.—Suit on a recognizance given before a justice for the appearance of defendant S. to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asks to have this property so applied: *Held*, that a demurrer for misjoinder of causes of action lies; that the trust deed has nothing to do with the liability of the sureties: *People v. Skidmore*, 17 Cal. 260.

61. Sheriff, Action against.—Where in an action against the sheriff, the plaintiff's declaration contained one count in case against him as sheriff, for so negligently executing the writ as to cause plaintiff to lose his debt, and another in trover and conversion, against him individually for the value of the goods, such joinder is not error, for they are both actions on the case, the plea and judgment being the same in each; and the demurrer of the defend-

ant to the declaration, on the ground of misjoinder, was properly overruled: *Patterson v. Anderson*, 40 Penn. 359. But where a complaint against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, the complaint is demurrable: *Ghirardelli v. Bourland*, 32 Cal. 585.

62. Trespass.—In an action for trespass, where the value of the property and damages were claimed: *Held*, that demurrer would not lie for misjoinder of actions: *Tendeson v. Marshall*, 3 Cal. 440.

No. 552.

viii. *On the Ground that the Complaint does not State Facts Sufficient to Constitute a Cause of Action.*

[TITLE.]

The defendant demurs to the complaint filed in this action, and for cause of demurrer alleges:

That the complaint does not state facts sufficient to constitute a cause of action.

63. Action Premature.—Where the action was premature, defendant may demur for insufficient facts: *Harvey v. Chilton*, 11 Cal. 114; *Hicks v. Branton*, 21 Ark. 186. The court will not presume, in support of the demurrer, that the debt was not due when action was commenced: *Maynard v. Talcott*, 11 Barb. 569. In an action on a bond dated May 10, 1853, conditioned for the payment of a sum "in two years from the first day of April last, with annual interest," a demurrer, on the ground that no cause of action was stated, was tried in June, 1854: *Held*, that as interest was due before the time of trial, the plaintiff was entitled to judgment upon the demurrer. A demurrer is not the mode, under the New York code, of raising the objection that the cause of action had not accrued when the action was commenced: *Smith v. Holmes*, 19 N. Y. 271.

64. Attachment.—A writ of entry contained a command to attach the property of the defendant, and for want thereof to take the body; *quare*, whether a demurrer is a proper mode of taking advantage of the error: *Clement v. Clement*, 18 N. H. 611. Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office another attaching creditor attaches the surplus, and seeks to make the ex-sheriff liable therefor on his official bond: *Held*, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render the defendant officially liable: *Graham v. Endicott*, 7 Cal. 144.

65. Bill of Exchange.—It seems that in an action against drawer and acceptor of a bill, the complaint cannot be held bad on a joint demurrer by both defendants, put upon the ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action against either defendant: *Woodbury v. Sackrider*, 2 Abb. Pr. 402; and compare *Peabody v. The Washington County Mutual Ins. Co.*, 20 Barb. 339.

66. Bond—Delivery.—An omission to aver delivery in suit on a bond, must be taken advantage of on demurrer: *Garcia v. De Satrustegui*, 4 Cal. 244.

67. Cloud on Title.—The objection that the complaint does not present a case for the exercise of the court to remove a cloud on title may be demurred to, under this cause of demurrer: *Hotchkiss v. Helting*, 36 Barb. 39.

68. Company—Membership.—Suing a party as member of a company, and failing in body of complaint to aver membership, is ground for demurrer: *Tolmie v. Dean*, 1 Wash. T. 61.

69. Date Illegal.—Where the day of making the contract is immaterial, that the day laid in the declaration would be illegal, is not a ground of demurrer: *Amory v. McGregor*, 12 Johns. 287.

70. Departure.—Thus, it is not good ground for demurrer that an amended petition departs from the cause of action set out in the original petition: *Hord v. Chandler*, 13 B. Monr. 403.

71. Defective Complaint.—Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objection to it should be taken by special demurrer: *Greenfield v. Steamer Gunnell*, 6 Cal. 67; *Lafleur v. Douglass*, 1 Wash. T. 215. As the want of profert of letters of administration in New York: *Allison v. Wilkin*, 1 Wend. 153. So, for duplicity in the allegations of the complaint: 1 Chitt. 512; *Bradner v. Demick*, 20 Johns. 404; *Winterson v. Eighth Av. R. R. Co.*, 2 Hilt. 389; *Wolfe v. Luyster*, 1 Hall, 146. A demurrer for duplicity must point it out specifically: *Currie v. Henry*, 2 Johns. 433; see, also, *Gooding v. McAllister*, 9 How. Pr. 123. In Alabama, a demurrer will not lie for this ground: *Wynne v. Whisenant*, 37 Ala. 46. Nor will it lie for a variance between judgment and execution, in an action for an escape: *Dakin v. Hudson*, 6 Cow. 221. In New York, a demurrer on the ground of want of facts can only be sustained where the complaint presents defects so substantial in their nature, and so fatal in their character, as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever: *Richards v. Edick*, 17 Barb. 260; *Graham v. Camman*, 5 Duer, 697; *De Witt v. Swift*, 3 How. Pr. 280. For a substantial and radical defect in the complaint, the proper ground for demurrer is that complaint does not state facts sufficient to constitute a cause of action: 4 How. Pr. 226; 14 Id. 282; 5 N. Y. 359; *Spear v. Downing*, 12 Abb. Pr. 437; 34 Barb. 523.

72. Defect of Parties.—A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action does not raise the question of a defect of parties defendant: *Tennant v. Pfeister*, 51 Cal. 511. But the court below having sustained such a demurrer in the present case, *pro forma*, with a view to a more speedy decision by this court of the question involved, and the question of a defect of parties having been discussed by counsel on both sides, as though it were raised by the demurrer, the order sustaining the demurrer is reversed, without prejudice to the right of the respondent to object to the want of proper parties: *Burhop v. Milwaukee*, 18 Wis. 431.

73. Definition of Terms.—The words, "the complaint does not state a sufficient cause of action," held equivalent to the language of the code: *De Witt v. Swift*, 3 How. Pr. 280. But when certain deficiencies are specified, all other grounds of objection are excluded: *Nellis v. De Forest*, 16 Barb. 61.

74. Demand.—A complaint for money had and received, which fails to allege a demand, is bad on demurrer: *Reina v. Cross*, 6 Cal. 31.

75. Demurrer Lies.—In the sixth subdivision, a demurrer to a complaint will be sustained, “when the complaint does not state facts sufficient to constitute a cause of action.” It applies only to such defects as would render the count bad on general demurrer at law, or bad for want of equity in chancery. The complaint, therefore, to be overthrown by such a demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained; and if the defendant requires a greater degree of certainty than is found in the complaint, he must seek his relief by a motion that the pleading be made more certain and definite: *Summers v. Farrish*, 10 Cal. 347; *Allen v. Patterson*, 3 Seld. 476; *Richards v. Beavis*, 28 Eng. L. & Eq. R. 157; *People v. Mayor of N. Y.*, 8 Abb. Pr. 7; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Thompson v. O’Sullivan*, 6 Allen (Mass.) 303. Where a complaint fails to state a cause of action, and the defendant, at the trial, objects, on that ground, to the introduction of any evidence, such objection is equivalent to a general demurrer, and a judgment for the plaintiff must be reversed: *Hays v. Lewis*, 17 Wis. 210.

76. Demurrer, when Taken.—Demurrer under this subdivision may be taken at any stage of the case: *Gould v. Glass*, 19 Barb. 186; *Higgings v. Freeman*, 2 Duer, 650; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld. 464; *Hays v. Lewis*, 17 Wis. 210; *People v. Booth*, 32 N. Y. 397. Nor is the failure to demur upon this ground a waiver of the objection: Cal. Code C. P., sec. 434; *Andrews v. Lynch*, 27 Mo. 167; *Ludington v. Taft*, 10 Barb. 447.

77. Demurrer will not Lie.—But under this subdivision defendant cannot bring objections to the form of the action: 17 Barb. 260; 5 Duer, 697; *Loomis v. Tift*, 16 Barb. 541; nor that the court has no jurisdiction: *Wilson v. Mayor of N. Y.*, 6 Abb. Pr. 6; 15 How. Pr. 500; 4 E. D. Smith, 706, note; nor that there is an improper joinder of parties: *Eldridge v. Bell*, 12 How. Pr. 547; nor that the plaintiff has not legal capacity to sue: *Vibert v. Frost*, 3 Abb. Pr. 120; *Hobart v. Frost*, 5 Duer, 671; nor that the right to sue is in a third person not a party to the action: *Myers v. Machado*, 6 Abb. Pr. 198; but see *Palmer v. Smedly*, Id. 205; *De Witt v. Chandler*, 11 Abb. Pr. 459; nor that complaint does not show authority to sue: *Bank of Louisville v. Edwards*, 11 How. Pr. 216; *Bank of Havana v. Wickman*, 7 Abb. Pr. 134. The objection that money sued for, if due at all, is due to plaintiff and another as partners, is not a demurrer: *Andrews v. Mok. Hill Co.*, 7 Cal. 330. So, when the bill alleges a parol trust, a general demurrer will not lie: *Peralta v. Castro*, 6 Cal. 354.

78. Divorce.—An objection that a complaint in an action for divorce, stating the existence of common property, is uncertain and defective in not stating the facts showing the property to be common, must be raised by demurrer, or it will be deemed waived: *Gimmy v. Gimmy*, 22 Cal. 633.

79. Effect of Demurrer.—A demurrer on this subdivision puts in issue the validity of the entire complaint: *White v. Brown*, 14 How. Pr. 282; *Spear v. Downing*, 12 Abb. Pr. 442; 34 Barb. 523. And if it specifies certain allegations deemed essential, it excludes all other grounds of objection than those which are particularly set forth: *Nellis v. De Forest*, 16 Barb. 61. And

the statement that certain parts of the complaint are immaterial and redundant does not vitiate the demurrer: *Smith v. Brown*, 6 How. Pr. 383. But defendants cannot by demurrer refuse to grant a compensation which the demurrer admits the right of: *Selkirk v. Sacramento Co.*, 3 Cal. 323.

80. Enforcement of Judgment.—When the bill shows that the complainant, who seeks to enforce a judgment at law, is chargeable with laches, the defendant may take advantage of it by demurrer: *Maxwell v. Kennedy*, 8 How. U. S. 210.

81. Exhibits.—Matters of substance, which are necessary to be alleged in a complaint, cannot be left out, and the defect supplied by reference to an exhibit attached to and made part of the complaint: *City of Los Angeles v. Signoret*, 50 Cal. 298.

82. Guaranty.—A complaint alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurable, as it should have contained an assignment of the breach of the contract or guaranty: *Dabovich v. Emeric*, 7 Cal. 109.

83. Inferential Statement.—If a material fact is only stated inferentially in a complaint, and the pleading is not demurred to specially for this reason, it is good after judgment: *Hill v. Haskin*, 51 Cal. 175.

84. Liens.—An objection to a lien for want of dates may be made on demurrer or on a motion to strike off, but after pleading to the *scire facias*, it must be considered as waived: *Howell v. The City of Philadelphia*, 38 Penn. 471.

85. Performance.—Where complaint states a condition precedent, but fails to aver performance, defendant may demur: *Happe v. Stout*, 2 Cal. 460. So in case of a promissory note: *Rogers v. Cody*, 8 Cal. 324. A demurrer for the cause that complaint does not state facts sufficient to constitute a cause of action may be disregarded, if defendant choose to answer instead of standing on the demurrer; *Levey v. Fargo*, 1 Nev. 415; but see Cal. Code C. P., sec. 431.

86. Presentation of Claim.—Where, in an action of foreclosure, the complaint fails to state the presentation to, and rejection by the administrator, of the claim against the estate, defendant may demur on the ground of insufficient facts: *Ellisen v. Halleck*, 6 Cal. 386; *Falkner v. Folsom*, Id. 412; *Hentsch v. Porter*, 10 Id. 558. These cases are overruled by *Fallon v. Butler*, 21 Cal. 24; and the correctness of the latter decision is doubted by the case of *Ellis v. Polhemus*, 27 Cal. 354. The case of *Ellisen v. Halleck*, 6 Cal. 393, is either discussed or referred to in the following cases: 6 Cal. 412; 7 Cal. 124; 9 Cal. 501; 24 Cal. 498.

87. Quo Warranto.—In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp, and enjoy the office without a license, and also certain allegations as to the right of relator to the office: *Held*, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office: *Flynn v. Abbott*, 16 Cal. 358.

88. Res Adjudicata.—Demurrer will not lie to a bill on the ground of *res adjudicata*, unless it avers that everything in controversy, as the foundation of the suit, was in controversy in the former suit: *Moss v. Anglo-Egyptian Navigation Co.*, Law Rep. 1 Ch. 108. The judgment of a court of competent jurisdiction upon a material matter put directly in issue by the pleadings is *res adjudicata* as to that issue, and the parties are estopped by the judgment from litigating it again: *Jackson v. Lodge*, 36 Cal. 28. A general demurrer does not raise the question whether a judgment pleaded as an estoppel does estop the defendants: *Spanagel v. Reay*, 47 Id. 608.

89. Securities.—The objection that securities sued on are not promissory notes must be made on demurrer: *Powell v. Ross*, 4 Cal. 197.

90. Services of Physician.—In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection: *McDaniel v. Yuba County*, 14 Cal. 444.

91. Specific Relief.—To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law, and if the bill discloses such remedy at law it will be dismissed upon demurrer: *Lupton v. Lupton*, 3 Cal. 120.

92. Stamp on Note.—A demurrer will not lie to a complaint on a promissory note which fails to aver or show that the note was duly stamped: *Hallock v. Jaudin*, 34 Cal. 167.

93. Statement of Grounds.—The demurrer is sufficient without a specification of the reason why the facts stated are not sufficient: *Kent v. Snyder*, 30 Cal. 666. It is sufficient under this subdivision to state that the complaint does not state facts sufficient to constitute a cause of action: *Haire v. Baker*, 5 N. Y. 357; *Paine v. Smith*, 2 Duer, 298; *Johnson v. Wetmore*, 12 Barb. 433; *White v. Brown*, 14 How. Pr. 282; to the contrary: *Purdy v. Carpenter*, 6 How. Pr. 361; citing *Van Santv. Pl.* 421; *Hunds v. Tweddle*, 7 Id. 278.

94. Statute of Frauds.—The statute of frauds may be taken advantage of on demurrer to a bill which on its face states a case covered by the statute: *Randall v. Howard*, 2 Black, U. S. 585. But where the contract declared upon is void if not in writing, the court will assume, for the purposes of the demurrer, that it is in writing, though not so alleged: *Miles v. Thorne*, 38 Cal. 337.

95. Statute of Limitations.—If it appear on the face of the complaint that the demand is barred by the statute of limitations, demurrer will be sustained. But the bar of the statute must clearly appear on the face of the complaint: *Smith v. Hall*, 19 Cal. 85; *Smith v. Richmond*, Id. 476; *Ord v. De La Guerra*, 18 Id. 67; but see, on this point, *Sands v. St. John*, 36 Barb. 628; 23 How. Pr. 140. If the complaint fails to show whether the contract was verbal or in writing, it will be presumed to be in writing for the purposes of the demurrer: *Miles v. Thorne*, 38 Cal. 335. It should be distinctly stated in the demurrer: *Brown v. Martin*, 25 Id. 89; *Farwell v. Jackson*, 28 Id. 106. It is a personal privilege which must be set up or be deemed waived: *Grattan v. Wiggins*, 23 Id. 16. Under our system the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the

statute, the complaint is defective, and demurrer lies: *Smith v. Richmond*, 19 Cal. 476; *Maxwell v. Kennedy*, 8 How. U. S. 210. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in answer. Where a bill in equity states a case to which the act of limitations applies, without bringing it within some of the savings, the defendant may take advantage of the bar by demurrer: *Wisner v. Barnett*, 4 Wash. C. Ct. 631. Where the statute creates an absolute bar by mere lapse of time, without exception, the defense may be made by demurrer, if the necessary facts appear in the complaint: *State v. Bird*, 22 Mo. 470. But the demurrer should be resorted to only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had: *McNair v. Lott*, 25 Mo. 182. By the practice in New York, it appears that the defense of the statute of limitations can only be taken by answer: N. Y. Code, ed. 1877, sec. 413; *Sands v. St. John*, 36 Barb. 628; S. C., 23 How. Pr. 140. An allegation in a demurrer, "that it appears by the complaint that the cause of action is barred by the statute of limitations," is sufficient in form to raise the question of law as to whether the alleged cause of action is barred by the statute: *Brennan v. Lord*, 46 Cal. 7.

96. Statutory Penalty.—In an action to recover damages by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use, or that of his family; and the omission of those allegations was fatal: *Hanson v. Webb*, 3 Cal. 237.

97. Undertaking on Attachment.—In an action on an undertaking, executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking: *Williamson v. Blattan*, 9 Cal. 500. A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action: *Id.*

98. Undertakings — Penal Bonds.—In an action by the postmaster-general against a deputy postmaster and his sureties, on the bond executed by them, the sureties pleaded that plaintiff did not, as he was bound by law to do, call upon his deputies to settle his accounts, or cause suits to be brought against him for not so doing; nor did he give notice to the sureties of the defaults, but fraudulently, and in violation of his duty to the United States and to the sureties, neglected to bring such actions, and to give notice: *Held*, that the demurrer having admitted the fraud stated in the plea, the plaintiff could not recover: *Postmaster-general v. Ustick*, 4 Wash. C. Ct. 347; *United States v. Sawyer*, 1 Gall. 86; *Greathouse v. Dunlap*, 3 McLean, 303; *McCue v. Corporation of Washington*, 3 Cranch C. Ct. 639.

99. What it Admits.—Demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, admits the validity of the statute authorizing plaintiff to sue: *Litchfield v. McComber*, 42 Barb. 288.

100. Written Instrument.—An objection to the pleading of a written instrument, by stating its legal affect, instead of setting forth its contents, can be taken only by demurrer: *Kellogg v. Baker*, 15 Abb. Pr. 286.

*No. 553.**ix. On the Ground of Ambiguity.*

[TITLE.]

The defendant demurs to the complaint, and for cause of demurrer alleges:

That the complaint is ambiguous, unintelligible, and uncertain. [Point out specially in what the ambiguity or uncertainty consists.]

101. Demurrer Lies.—This cause of demurrer may be interposed when the complaint is “ambiguous, unintelligible, or uncertain.” Under this subdivision it is necessary for the pleader to point out wherein the complaint is ambiguous, unintelligible, or uncertain, or it will be disregarded: *Blanc v. Klumpke*, 29 Cal. 156; *Yolo Co. v. Sacramento*, 36 Id. 193; *Lorenzana v. Camarillo*, 45 Id. 125. The defendant is entitled to a distinct averment in the complaint of the facts which the plaintiff claims to exist, and if the averments are in the alternative, the complaint is ambiguous, even if either averment states a cause of action: *Jamison v. King*, 50 Id. 132. For a special case of ambiguity see *Tomlinson v. Monroe*, 41 Id. 94.

102. Ejectment.—In ejectment, where the complaint avers that “the plaintiff on a day named was, and ever since has been, and still is, the owner in fee simple, seized and possessed,” etc.; “that, on a day thereafter named, and while the plaintiff was so the owner in fee simple, seized and possessed, defendants entered and ousted him, and from thence hitherto have and still do withhold the same,” etc., may be demurred to for ambiguity: *Brown v. Martin*, 25 Cal. 82.

103. New York.—Mere indefiniteness and uncertainty are not enough to sustain a demurrer in the state of New York: *Chesbrough v. N. Y. and Erie R. R. Co.*, 13 How. Pr. 557; *People ex rel. Crane v. Ryder*, 12 N. Y. 433; *Roeder v. Ormsby*, 13 Abb. Pr. 334.

104. Official Bond.—In an action on an official bond, if the complaint alleges the execution of the bond, and a copy of the bond annexed should not contain the signature of the principal, defendant may demur for ambiguity: *Mendocino Co. v. Morris*, 32 Cal. 145. A complaint in an action on the bond given by a tax collector is not ambiguous and uncertain because it does not aver that any of the money sued for was collected on account of foreign miners’ licenses: *People v. Love*, 25 Cal. 520.

105. Sale and Delivery.—A declaration setting forth that plaintiff had purchased a quantity of goods from W. and P., “then and there acting as agent of the defendant,” is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer: *Cochran v. Goodman*, 3 Cal. 245.

106. When Demurrer will not Lie.—In Ohio, demurrer will not lie for indefiniteness or uncertainty. So, a demurrer will not lie for uncertainty in New York. The omission to state the time and place of slander is not a ground for demurrer; the remedy is by motion: *Finnerty v. Barker*, 7 N. Y. Leg. Obs. 316. So, where an executor united notes payable to his testator:

Welles v. Webster, 9 How. Pr. 251. But a demurrer will lie for uncertainty in California: Cal. Code C. P., sec. 430, subd. 7. A demurrer, on the ground of ambiguity, should be overruled if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt: *Salmon v. Wilson*, 41 Cal. 595. The question of ambiguity is not raised on a demurrer for want of facts: *Slattery v. Hall*, 43 Id. 191.

No. 554.

x. *Several Grounds of Demurrer.*

[TITLE.]

The defendant demurs to plaintiff's complaint on the following grounds:

I. That the court has no jurisdiction of the person of the defendant [or, as the case may be, of the subject of the action].

II. That plaintiff has not legal capacity to sue [state why].

III. That there is another action pending between the same parties, for the same cause of action.

IV. That there is a defect [or, misjoinder] of parties plaintiff [or defendant]. [State in what the defect or misjoinder consists].

V. That several causes of action have been improperly united in this [state how improperly united].

VI. That the complaint does not state facts sufficient to constitute a cause of action. [No reasons need be assigned under this subdivision].

VII. That the complaint is ambiguous, unintelligible or uncertain, [point out specially in what the ambiguity or uncertainty consists].

107. Note.—A pleading should not be demurred to: First, Unless it is clearly demurrable; and, Second, Except for cause which clearly appears upon the face of the complaint: *Davy v. Betts*, 23 How. Pr. 395; *Dillaye v. Wilson*, 43 Barb. 261. The fact that the statute gives several instances wherein a demurrer may be made affords no excuse for exhausting the list on every complaint demurred to; although several causes of demurrer may be assigned.

PART FOURTH.

DEFENSES TO THE ACTION.

CHAPTER I.

ANSWERS IN GENERAL.

1. If the defendant does not demur, or having demurred, the plaintiff has filed and served an unobjectionable complaint, his only alternative method of defense is to answer the complaint by matter of fact. In the ordinary sense, an answer means a reply. In pleading, it may be a reply which either admits or denies the facts alleged in the complaint, or it may admit, and then avoid the effect of the admission by making a counter statement. In either case the object of an answer is to make an issue. Without an issue no trial can be had, because there is no question of difference between the plaintiff and defendant—in other words plaintiff asks for nothing which defendant refuses to grant him. Burrell, in his Law Dictionary, vol. i., defines an answer to be any pleading, except a demurrer, framed to meet a previous pleading.

2. Under our practice, where the complaint is sworn to, the defendant must deny specifically each allegation in the complaint: Cal. Code. C. P. sec. 437. But by each allegation is meant each material allegation; for if plaintiff makes averments in his complaint not necessary or material to present his cause of action, or if he avers conclusions of law, or sets out evidence, these need not be traversed, for they are not issuable facts, or, if issuable, they are not pertinent to the case. Because plaintiff makes a history of his complaint, there is no reason, necessity, or excuse for the defendant to deny the truth of that history. Nor is it proper to seek out the very words of the complaint, and

then negative each and every one of them. An issue is not as well or as clearly made by negating the language of the complaint in terms as by denying the facts expressed by such language.

3. If plaintiff has been wronged, some one has injured him, and defendant, to make an issue, only needs to deny the ultimate facts. In general, the reasons which caused the injury need not be pleaded. The commission of the injury, the time and place, extent of the injury, and the person who did it, in most cases should be traversed.

4. For example, in a case of forcible entry, defendant [the person] denies that on the day of January, 1870, or at any other time [the time], he broke or entered into the premises described [the wrong], or damaged plaintiff in any amount [extent of injury]. If, for instance, and which is frequently the case, the plaintiff alleges that at the time stated defendant wrongfully and unlawfully broke, etc., etc., defendant need only deny the breaking; the Court will be competent to say whether it was wrongful or unlawful after the proofs are heard. That is what the Court is for. The pleader, whether representing plaintiff or defendant, should only allege or deny the facts; the effect of the existence of certain facts is left for the disposition of the tribunal which the parties appeal to for justice.

5. Defendant's counsel, when about to make answer to a complaint, inquires: First, Has any wrong been alleged in the complaint? Second, Does the complaint charge the defendant with the commission of the wrong. Third, Is defendant liable to the extent alleged in the complaint? Fourth, Has defendant a counter claim? Fifth, Was the injury done within the Statute of Limitations? Sixth, Did the defendant do the wrong? And these inquiries will suggest to the pleader what answer will raise an issue.

6. When any of the matters enumerated in Section 430 of the Cal. Code C. P. (N.Y. Code, § 488), do not appear upon the face of the complaint, the objection may be taken by answer; and the demurrer to the complaint having been disposed of, the defendant may make his answer, filing the original with the clerk of the court in which the action is brought, and serving a copy upon the adverse party or his attorney: Cal. Code C. P., sec. 465; *Oliphant v. Whitney*,

34 Cal. 25. For the time within which the defendant must answer, see Cal. Code C. P., sec. 407, subd. 3. But the time to answer may be extended by the Court or judge: *Id.*, secs. 473 and 1054.

7. The time to answer in the several states is fixed by the statutes of such states, and the practice of the courts in many of them differs from the practice in California. In New York, defendant must answer within the statutory time or such further time as he may obtain by order: See N.Y. Code, secs. 520, 781 and 782. In California an answer filed without leave of court, after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity: Code C. P., sec. 473; *Bowers v. Dickerson*, 18 Cal. 420. The Court in its discretion may strike it out or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer stricken out. For these purposes defendant is not in default until his default has been actually entered in accordance with the statute: *Id.* If the defendant demurs only, and the demurrer is overruled, the Court may allow him to answer, imposing terms in its discretion: See Cal. Code C. P., secs. 432, 472 and 473; *Maumus v. Hamblon*, 38 Cal. 539.

8. In reference to the time in which the answer must be filed, courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of the country into states, counties, cities, towns, etc.: *People v. Smith*, 1 Cal. 9. When a demurrer is interposed and overruled, the question of time to answer and terms are chiefly regulated by the rules and discretion of the Court in which the cause is pending: *Thornton v. Borland*, 12 Cal. 438; Cal. Code C. P., secs. 472, 473, 1054; *People v. Rains*, 23 Cal. 128. For if the demurrer is deemed frivolous, terms will be imposed before answer is allowed. Such a rule is required to prevent demurrer from becoming a means of delay only, and if the Court does not fix the time within which answer in such case must be filed, the defendant should answer within the same time as in case of service of copy of the original complaint: *People v. Rains*, 23 Cal. 128.

9. When the defendant, on motion being decided in his favor, is allowed time to answer until the plaintiff elects on

which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint with the notice of his election: *Willson v. Cleveland*, 30 Cal. 192. And if an answer has been already filed, it may be allowed by order of the Court to stand as the answer to such amended complaint, and it shall be treated as if filed when the order is made: *Mulford v. Estudillo*, 32 Cal. 131. If the defendant should fail to answer in the time specified in the summons, it is not an unsound exercise of discretion in the Court to refuse him leave to file an answer which does not show a meritorious defense: *Hallowell v. Page*, 24 Mo. 590; *Page v. Page*, Id. 595. Under the California practice, the defendant may file an appearance, and answer immediately after suit brought, and without service, if he so desires, thus joining issue at once.

DEFENSE.

10. A defendant should set forth the true nature of his defense in his answer: *Wulton v. Minturn*, 1 Cal. 362. As the proofs for the defense must be limited to the averments in the answer: *Turner v. "Black Warrior"*, 1 McAll. 181. Where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint, must be set up in the answer: *Terry v. Sickles*, 13 Cal. 427. Or it may be addressed to part of the complaint, and must be so stated: *Nichols v. Dusenbury*, 2 N. Y. 283; *Foster v. Hazen*, 12 Barb. 547; *Kneedler v. Sternbergh*, 10 How. Pr. 67. If the complaint contains two counts, and the answer takes issue on the allegation of one only, plaintiff is entitled to judgment on the other: *Leffingwell v. Griffing*, 31 Cal. 231.

11. Equitable defenses may be set up in an action of a legal nature: *Dobson v. Pearce*, 12 N. Y. 156; S. C., 1 Abb. Pr. 97; *Crary v. Goodman*, 12 N. Y. 266; reversing S. C., 9 Barb. 657; *Burget v. Bissell*, 5 How. Pr. 192; and see *Miller v. Platt*, 5 Duer, 272, 284. Whether an answer states a purely legal or an equitable defense, must be determined by the answer itself, and not from the findings of the court: *Bodley v. Ferguson*, 30 Cal. 511. But an issue of law and fact should not be mixed in an answer: *Brooks v. Douglass*, 32 Cal. 208; *Gould v. Williams*, 9 How. Pr. 51. In the

natural order of business, it is the duty of the Court first to try and decide upon this equitable defense, before proceeding with the action at law: *Martin v. Zellerbach*, 38 Cal. 300. Though two defenses, separately pleaded, may be inconsistent, the plaintiff cannot disregard them, or either of them, on the trial; and there is no distinction in this respect between verified and unverified pleadings: *Buhne v. Corbett*, 43 Cal. 264; and see *Bell v. Brown*, 22 Id. 678.

12. In pleading an ordinance or enactment founded upon a statute, in an action on contract, which is in violation of said ordinance, it is not necessary to plead the statute specially: *Beman v. Tugnot*, 5 Sandf. 153.

13. In Indiana, where an answer is founded on a written instrument, a copy of the instrument must be annexed: *Seawright v. Coffman*, 24 Ind. 414. In California, when a written instrument is so pleaded, the genuineness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same: Cal. Code C. P., sec. 448. But not by a failure to controvert the same on oath, as prescribed in this and section 447, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such affidavit. That the execution of the writing sued upon is put in issue by the plea of the general issue, see *Gray v. Tunstall*, Hempst. 588. It has been held in some of the states, that, if a defendant sets up a contract which is required to be in writing, he must so state it, or his answer is insufficient: *Taylor v. Hillary*, 1 Gale, 22; but see 15 Barb. 368; *Miles v. Thorne*, 38 Cal. 335.

PLEAS.

14. Pleas, by that name, are unknown to the code. The only pleadings, on the part of the defendant, are demurrer and answer. But in an equitable case, prior to the code, a plea was but a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, or delayed, or barred. At law, it was the defendant's answer, by matter of fact, to the plaintiff's declaration. Now, the defendant's pleading, while performing any or all these several offices, is known only as an answer.

A respondent is not bound to reserve, for a final hearing, any matter which amounts to a bar of the relief prayed, but he may, if it be the subject for a plea, put it into that shape, in order to save the expense of going into a general examination: *Wilson v. Graham*, 4 Wash. C. Ct. 53. It is a general rule that a plea ought not to contain more defenses than one. Various facts can never be pleaded in one plea, unless they are all conducive to the single point on which the defendant means to rest his defense: *Rhode Island v. Massachusetts*, 14 Pet. 210.

15. A plea professing to answer the whole complaint, but which answers only a part, is bad on demurrer: *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461; *Weimer v. Shelton*, 7 Mo. 237; *Leslie v. Harlow*, 18 N. H. 518; *Feaster v. Woodfill*, 23 Ind. 493; *Fitzsimmons v. City Ins. Co.*, 18 Wis. 234; *Hogan v. Ross*, 13 How. U. S. 173. A defendant cannot in different counts deny the same facts in different language, or make only a partial defense to a whole cause of action, or set out matter in avoidance, without confessing that which he attempts to avoid: *Martin v. Swearengen*, 17 Iowa, 346. A plea is defective when its averments, if admitted to be true, would not constitute a defense to the action: *White v. How*, 3 McLean, 291; *Smith v. Ely*, 5 Id. 76.

16. That the plea should be direct in stating with sufficient precision the matter of defense, and not leave it to be found out by inference, however strong, see *Brooks v. Bryan*, 1 Story C. Ct. 296; *Savary v. Goe*, 3 Wash. C. Ct. 140. But material facts inferentially stated are good after judgment, if no demurrer has been interposed specially for that reason: *Hill v. Haskin*, 51 Cal. 175. Matters of inducement in a plea should be an answer to the opposite party's allegations. The traverse is but an inference from the inducement: *Egbert v. Dibble*, 3 McLean, 86. A plea which might be objectionable on the ground of want of sufficient certainty cannot be treated as a nullity by the Court, unless its sufficiency is excepted to: *Cunningham v. Wheally*, 21 Texas, 184.

17. If the allegations of a defense are pertinent to the controversy, their sufficiency is only to be tested by demurrer, or on the trial: *Carpenter v. Bell*, 19 Abb. Pr. 258. But in New York it has been held, an answer merely defensive,

which does not set up a counter-claim is not demurrable: *Reilay v. Thomas*, 11 How. Pr. 266. Where a party sets up matter in his answer not recognized by law as a defense to the action, while the objection may be taken by demurrer, it is not waived by failure to demur, but may be taken advantage of at any time: *Macdougall v. Maguire*, 35 Cal. 274.

18. The defense, that the defendant acted by advice of counsel, must show that such advice was given upon a full and fair statement of the facts: *Bliss v. Wyman*, 7 Cal. 257. It is improper to set up in an answer that the complaint does not contain facts sufficient to constitute a cause of action: *Slack v. Heath*, 1 Abb. Pr. 331; but see Cal. Code C. P., sec. 431.

WHAT ANSWER SHOULD CONTAIN.

19. "The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant; 2. A statement of any new matter constituting a defense or counter-claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint:" Cal. Code C. P., sec. 437.

20. The plaintiff is entitled to an explicit denial of the material allegations of the complaint, or an admission of their truth, either by direct statement or by silence: *Racouillat v. Rene*, 32 Cal. 450; *Gay v. Winter*, 34 Cal. 153. The material allegations are such as the plaintiff must prove on the trial, in order to maintain his action: *Garvey v. Fowler*, 4 Sandf. 665. And a denial of such allegations only, is sufficient: Cal. Code C. P., sec. 437. A general denial only puts in issue the material allegations of the complaint: *Id.* But it seems that in New York, a general and specific denial of the same matter is not allowed, and one or the other will be stricken out as redundant: 1 Van Santv. Pl.

408; N. Y. Code, sec. 500; *Dennison v. Dennison*, 9 How. Pr. 246; *Blake v. Eldred*, 18 Id. 240. In Louisiana, under the code of that state, which allows general and special pleas, if not inconsistent with each other, an amended answer which specifies a particular fact in aid of the general denial is allowable: *Andrews v. Hensler*, 6 Wall. U. S. 254.

DENIALS IN THE ANSWER.

21. A denial may be general or specific, at the option of the pleader; but in either case it must be direct and unequivocal. An averment that this defendant says he denies is sufficient: *Espinosa v. Gregory*, 40 Cal. 58; *Munn v. Taulman*, 1 Kans. 254; but see *Taylor v. Richards*, 9 Bosw. 679; *Arthur v. Brooks*, 14 Barb. 533; *Blake v. Eldred*, 18 How. Pr. 240; *West v. Am. Exch. Bank*, 44 Barb. 175; *Mower v. Burdick*, 4 McLean, 7. Though they are not necessarily frivolous: *Elton v. Markham*, 20 Barb. 343; *Lawrence v. Williams*, cited in *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119-122; *Livingston v. Hammer*, 7 Bosw. 670. So, a general denial, of a verified complaint, with a qualification of "except as hereinafter admitted," is insufficient to put in issue any of its allegations: *Hensley v. Tartar*, 14 Cal. 508; *Levinson v. Schwartz*, 22 Cal. 229; *People v. River Raisin R. R. Co.*, 12 Mich. 389.

22. A denial of each and every allegation of a complaint, except what the Court may construe to be admitted in the foregoing part of the answer, is bad: *Starbuck v. Dunklee*, 10 Minn. 168. A denial of an allegation that defendant did as therein alleged, is bad: *Mier v. Cartlege*, 4 How. Pr. 115; but see the English Practice, Chitty's Forms of Pr. 107, 108. So, also, if no issue is raised by the defendant, a closing denial, stating that "the defendant denying each and every allegation set forth in the plaintiff's complaint not consistent with the foregoing answer," fails to raise an issue: *Richardson v. Smith*, 29 Cal. 529. As a denial, whether general or special, only puts in issue the allegations of the complaint, the difference between a general and special denial is only in the extent to which the allegations are traversed: *Coles v. Soulsby*, 21 Cal. 47.

23. The material allegations of a complaint must be denied either positively or upon information and belief: *San*

Francisco Gas Co. v. San Francisco, 9 Cal. 453. And the failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader: 1 Van Santv. 398; 1 Barb. Ch. Pr. 133; *Burke v. Table Mt. Co.*, 12 Cal. 403; *Blankman v. Vallejo*, 15 Cal. 638; *Patterson v. Ely*, 19 Id. 28; *Surget v. Byers*, Hempst. 715. So, a denial of the exact value alleged in the complaint of the property sued for, is an admission of any lesser amount: *Towdy v. Ellis*, 22 Cal. 650. But where the defendant, instead of denying that the property alleged to have been destroyed was of the value of twenty-five thousand dollars, or any other sum greater than the sum of two thousand five hundred dollars, avers that the plaintiff has not sustained damage to exceed the latter sum, it puts in issue the value of the property, or the amount of the damages so far as they are laid at more than the latter sum: *Hill v. Smith*, 27 Cal. 476; *Nunan v. San Francisco*, 38 Cal. 689.

24. Such denial should cover the whole ground either of the complaint itself, or of that portion of it to which it is intended to apply: *Harpham v. Haynes*, 30 Ill. 404; *Loosey v. Orser*, 4 Bosw. 391; and present a clear and complete issue in substance as well as in form: *Dimon v. Dunn*, 15 N. Y. 498.

25. The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiffs, will throw the *onus* on defendant in proving his affirmative allegations: *Thompson v. Lee*, 8 Cal. 275; Cal. Code C. P., sec. 462. Where the answer failed to deny in such form as to put in issue any material allegations of the complaint, the plaintiff is entitled to judgment for the full amount: *Doll, Adm'r, v. Good*, 38 Cal. 287. An answer consisting of denials only is not amendable as of course: *Plumb v. Whipples*, 7 How. Pr. 411; *Farrand v. Herbeson*, 3 Duer, 655.

GENERAL DENIAL.

26. Under our system of practice in this State, a general denial is equivalent to the general issue: *White v. Moses*, 11 Cal. 69. But special matters of defense, as excuse or justification of an alleged trespass, a public or private right of

way, or any interest in land short of property, or right of possession, must still be pleaded, and are not available under a general denial: *American Co. v. Bradford*, 27 Cal. 367. It puts the plaintiff upon proof of all the facts necessary to entitle him to recover, except as to the genuineness and due execution of note, etc.: *Ward v. Packard*, 18 Id. 391. And upon not merely every fact alleged, but also upon all implications and conclusions of law arising out of those facts: *Bellinger v. Craigue*, 31 Barb. 534; *Academy of Music v. Hackett*, 2 Hilt. 217; *Lord v. Chesebrough*, 4 Sandf. 696.

27. There is no such thing as the common law general issue under the Code of New York: *Van Santv. Pl.* vol. i, p. 406; *Fay v. Grimsted*, 10 Barb. 321; *Houghton v. Townsend*, 8 How. Pr. 441; *Stoddard v. Onondaga Conf.*, 12 Barb. 575; *Catlin v. Gunter*, 1 Duer, 253. Although the general denial is in most respects like it: *Livingston v. Finkle*, 8 How. Pr. 486.

28. Under the general denial, evidence of a distinct affirmative defense is not admissible: *Terry v. Sickles*, 13 Cal. 430; *Beaty v. Swarthout*, 32 Barb. 293. Such as payment: *Walters v. Washington Ins. Co.*, 1 Clarke (Iowa) 404; *McKyring v. Bull*, 16 N. Y. 297; *Edson v. Dillaye*, 8 How. Pr. 273. It is otherwise held in California, where it is said the effect of the plea is to deny the indebtedness: *Wetmore v. San Francisco*, 44 Cal. 299. In actions of *assumpsit* the general rule is that any evidence which disaffirms the obligation of the contract at the time suit is commenced, is admissible under the general issue: 1 Chit. Pl. 465; 2 Hill, 478; 5 Id. 393.

29. See generally, as to evidence of any attendant circumstances tending to show that plaintiff has no cause of action against the defendant, being admissible under a general denial: 1 Van Santv. Pl. 252; *Bridges v. Paige*, 13 Cal. 640; *Miller v. Decker*, 40 Barb. 228; *MacDonell v. Buffum*, 31 How. Pr. 154; *Robinson v. Corn Ex. Ins. Co.*, 1 Abb. Pr. (N. S.) 186.

30. If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the facts alleged to exist do not exist, these aver-

ments of the answer traverse the matters alleged, and are good denials of the same: *Hill v. Smith*, 27 Cal. 479.

LITERAL AND CONJUNCTIVE DENIALS.

31. Under our practice, and that of the common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded: *De Ro v. Cordes*, 4 Cal. 117. It has also been held by our courts, that a specific denial to each allegation of a complaint is a separate denial applicable only to the specific allegation controverted: *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Seward v. Miller*, 6 How. Pr. 312; as the object of the code in allowing the plaintiff to verify is to narrow the proof on the trial, and compel the defendant to deny specifically each separate allegation: *Gas Company v. San Francisco*, 9 Cal. 453. And defendant must either deny the facts alleged, or confess and avoid them: *Piercy v. Sabin*, 10 Cal. 22; *Fish v. Redington*, 31 Cal. 185.

32. The rules of pleading under our system are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment: *Blankman v. Vallejo*, 15 Cal. 638; *Castro v. Wetmore*, 16 Id. 380; *Higgins v. Wortel*, 18 Id. 333; *Morrill v. Morrill*, 26 Id. 292; *Camden v. Mullen*, 29 Id. 564; *Blood v. Light*, 31 Id. 115; *Toland v. Mandell*, 38 Id. 30; *Doll v. Good*, 38 Id. 287.

33. It is now the settled law that where defendant denies plaintiff's proposition in a verified complaint, as a whole and as conjunctively stated, that it is alike in violation of the principles of common law pleading, as well as the express direction of our statute, and thus an answer to a verified complaint should contain a specific denial to each allegation of the complaint controverted, or a denial thereof according to the defendant's information and belief. The denial should be in the disjunctive, although the allegations of the complaint are stated in the conjunctive: *Reed v. Calderwood*, 32 Cal. 109; *Burke v. Carruthers*, 31 Cal. 467; *Fish v. Redington*, Id. 194; *Brown v. Scott*, 25 Id. 195; *Kuhland v. Sedgwick*, 17 Id. 123; *Hensley v. Tartar*, 14 Id. 508; *Salinger v.*

Lusk, 7 How. Pr. 430; *Davison v. Powell*, 16 Id. 467; *Shearman v. N. Y. Central Mills*, 1 Abb. Pr. 187; *Baker v. Bailey*, 16 Barb. 54; *Young v. Catlett*, 6 Duer, 443; *Beach v. Barons*, 13 Barb. 305; *Livingston v. Hammer*, 7 Bosw. 670; *Otis v. Ross*, 8 How. Pr. 193; *King v. Ray*, 11 Paige, 235; *Elton v. Markham*, 20 Barb. 343; *Blake v. Eldred*, 18 How. Pr. 240. But in New York, the doctrine, it would seem, has been qualified in *Wall v. Buffalo Wat. Works*, 18 N. Y. 119.

34. If an allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied: *More v. Del Valle*, 28 Cal. 170. Where several allegations of a complaint are not connected by the conjunction "and," a denial in the answer of these allegations conjunctively does not amount to a denial of the allegations to which the defendant professes to respond: *Fitch v. Bunch*, 30 Cal. 208; *Leroux v. Murdock*, 51 Id. 541.

35. Literal denials, following the very words of the complaint, are insufficient. So, where the answer denied the allegations of indebtedness as to the time, amount and work, in the very words of the complaint: *Held*, that the answer raised an immaterial issue upon these particulars: *Caulfield v. Sanders*, 17 Cal. 569. So, where the form of the allegation was that defendant "unlawfully and wrongfully seised and took said property into his possession from said plaintiff," and defendant denied "that he (defendant) wrongfully and unlawfully seized, took or carried away the said property:" *Held*, that the fact that defendant took the property from the plaintiff was not denied, but admitted: *Woodworth v. Knowlton*, 22 Cal. 164; *Richardson v. Smith*, 29 Id. 531.

36. An averment in the complaint that the act was "wrongfully and maliciously done," and a denial in the answer that it was "wrongfully and maliciously done," does not put in issue the doing of the act: *Kinsey v. Wallace*, 36 Cal. 463. But an allegation in a complaint that the assignment which the plaintiff seeks to set aside was made with intent to hinder, delay and defraud creditors, etc., is sufficiently put in issue by a denial that the assignment was

made with intent to hinder and defraud creditors: *Read v. Worthington*, 9 Bosw. N.Y. 617.

37. An allegation in a sworn answer, that "on a certain day the said French and Robinson, by deed duly executed, acknowledged and recorded, conveyed said premises to this defendant, for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication, that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial does not deny the conveyance, the material fact, but only a conveyance for a consideration. Under such denial, the party making such averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute: *Landers v. Bolton*, 26 Cal. 416.

DENIAL OF LEGAL CONCLUSIONS.

38. If the answer merely denies a conclusion of law resulting from the facts contained in the complaint, it is insufficient: Steph. Pl. 180; 1 Chitt. Pl. 645; 1 Van. Santv. 416; *Nelson v. Murray*, 23 Cal. 338; *Wormouth v. Hatch*, 33 Id. 128; *Lightner v. Menzell*, 35 Id. 452; *Christy v. Dana*, 42 Id. 174; *Witherspoon v. Van Dolar*, 15 How. Pr. 266; *Drake v. Cockroft*, 4 E. D. Smith, 34; 10 How. Pr. 377; 1 Abb. Pr. 203; *Fosdick v. Groff*, 22 How. Pr. 158; *Holgate v. Broome*, 8 Minn. 243; *Hoopes v. Meyer*, 1 Nev. 433. And the facts stated in the complaint will be deemed admitted: *Nelson v. Murray*, 23 Cal. 338.

39. A denial that the defendant became or was lawfully bound by a judgment declared on, is only a denial of a conclusion of law: *People v. Supervisors of San Francisco*, 27 Cal. 655. Nor is it a denial in an action for the possession of personal property to allege that defendant did not at any time wrongfully take and detain the property from the plaintiff: *Richardson v. Smith*, 29 Cal. 529. Or in ejectment that defendant did not wrongfully and unlawfully enter and dispossess the plaintiff. This is an admission rather than denial: *Busenius v. Coffee*, 14 Cal. 93; *Lay v. Neville*, 25 Cal. 549. So, a denial that the plaintiff has any interest what-

ever in the premises mentioned in the complaint is insufficient: *Bentley v. Jones*, 4 How. Pr. 202. So of an averment that "the plaintiff is not the real party in interest, nor is he an executor," etc.: *Russell v. Clapp*, 3 Code R. 64; S. C., 4 How. Pr. 347. So of an answer which, without denying any fact stated in the complaint, merely says that "the defendant denies that the plaintiff is entitled to the money demanded:" *Drake v. Cockroft*, 1 Abb. Pr. 203; and compare *Higgins v. Freeman*, 2 Duer, 650.

40. Where, however, the allegation of the plaintiff is itself couched in the form of a conclusion of law, a denial in the same form will be admissible, and efficient for all purposes: *Morrow v. Cougan*, 3 Abb. Pr. 328; *Anon.*, 2 C. R. 67; *Wager v. Ide*, 14 Barb. 468; *Davis v. Hoppock*, 6 Duer, 256; *McKnight v. Hunt*, 3 Id. 615. A mixed question of law and facts was under the old system traversable: Steph. Pl. 19. Within certain limits this rule is applicable to the present system. As where plaintiff alleged that defendant owed him a certain sum, an answer denying the indebtedness is sufficient: *Westlake v. Moore*, 19 Mo. 556; but see *Kinney v. Osborne*, 14 Cal. 112. A denial which is itself a conclusion of law raises no issue, as where an answer states in general terms that a municipal ordinance is illegal and void: *People v. Supr. of San Francisco*, 27 Cal. 655.

SHAM, IRRELEVANT, AND FRIVOLOUS ANSWERS.

41. "Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose:" Cal. Code C. P. sec. 453; see *Frost v. Harford*, 40 Cal. 166; *Felch v. Beaudry*, Id. 444. Immaterial averments in a pleading need not be denied: *Racouillat v. Rene*, 32 Cal. 450; *Toland v. Sprague*, 12 Pet. 300. And if it be done, both the complaint and answer, so far as they relate thereto, will be disregarded when the sufficiency of the pleadings and issues are brought in question: *Jones v. City of Petaluma*, 36 Cal. 220; *Doyle v. Franklin*, 48 Cal. 539; see, also, *Fry v. Bennett*, 5 Sandf. 54. Such was the rule in chancery: *Ulica Ins. Co. v. Lynch*, 3 Paige, 210; *Wiswall v. Wandell*, 3 Barb. Ch. 312. But a denial of immaterial circumstances may in some cases be treated as sufficient at the trial, if not previ-

ously objected to: *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119.

42. Matter not well pleaded need not be denied. For if a defendant merely denies what is non-essential in the averments of a complaint, it is an admission of all that is essential to a recovery: *Leffingwell v. Griffin*, 31 Cal. 231. For example, see *Landers v. Bolton*, 26 Id. 416; *Camden v. Mullen*, 29 Id. 564. And the denial of such averments is unnecessary: *Sauls v. St. John*, 23 How. Pr. 140; *Fry v. Bennett*, 5 Sandf. 54; *Parshall v. Tillou*, 13 How. Pr. 7; *Newman v. Otto*, 4 Sandf. 668; *Doran v. Dinsmore*, 33 Barb. 86; 20 How. Pr. 503; *Simonton v. Winter*, 5 Pet. 140; *Greathouse v. Dunlop*, 3 McLean, 303. Non-issuable matter need not be traversed: *Harbeck v. Craft*, 4 Duer, 122; *Edgerton v. Smith*, 3 Id. 614.

43. Hypothetical allegations in an answer are insufficient: *Wies v. Fanning*, 9 How. Pr. 543. But where, under the peculiar circumstances of the case, as payment could not be directly alleged, it might be stated in this way: *Doran v. Dinsmore*, 20 Id. 503; *Brown v. Ryckman*, 12 Id. 313. So, in order to avoid the cause of action alleged, a defendant need not confess it; he may aver that if any such contract was made, it was made jointly with others: *Taylor v. Richards*, 9 Bosw. 679.

44. Averment of plaintiff's belief is not traversable: *Radway v. Mather*, 5 Sandf. 654; *Patterson v. Caldwell*, 1 Metc. (Ky.) 492; *Walters v. Chinn*, Id. 502. Allegations anticipating a defense need not be denied: *Canfield v. Tobias*, 21 Cal. 349. Persons who make contracts with a corporation cannot deny its legal existence: *White v. Ross*, 15 Abb. Pr. 66; *East River Bank v. Rogers*, 7 Bosw. 494; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Park Bank v. Tilton*, 15 Abb. Pr. 384. The credit given on an account in the complaint is not a traversable fact: *Hodgins v. Hancock*, 14 Mees. & W. 120.

45. The amount of damages need not be denied: *Van Santv. Pl.* 249. So, the amount of damages on a breach of covenant need not be denied; *Hackett v. Richards*, 3 E. D. Smith, 13; *Raymond v. Traffarn*, 12 Abb. Pr. 52. So, circumstances of aggravation are not traversable: *Bates v. Loomis*, 5 Wend. 134; *Gilbert v. Rounds*, 14 How. Pr. 49;

Schnaderbeck v. Worth, 8 Abb. Pr. 37. Nor allegations of special damages, unless of the gist of the action: *Mulony v. Dows*, 15 How. Pr. 265; *Perring v. Harris*, 2 M. & Rob. 5. In Indiana, matters in mitigation of damages only, except in actions for libel and slander, cannot be specially pleaded or set up in the answer, but should be given in evidence under the general denial: *Smith v. Lisher*, 23 Ind. 500.

46. Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial: *Moore v. Murdock*, 26 Cal. 524; *Racouillat v. Rene*, 32 Cal. 450. Where plaintiff's declaration averred that defendants promised to pay plaintiffs as "the heirs of C.," a denial that plaintiffs were the heirs of C. was held bad, as not denying any material allegation: *Chandler v. Chandler*, 21 Ark. 95. Allegations of intention showing express malice are not issuable facts: *Fry v. Bennett*, 5 Sandf. 54.

47. The denial of time or place at which an act is alleged to have been done is frivolous, where time or place are not the substance of the action: *Castro v. Wetmore*, 16 Cal. 379; *Kuhland v. Sedgwick*, 17 Id. 123; *Livingston v. Hammer*, 7 Bosw. 670; *Davison v. Powell*, 16 How. Pr. 467; *Baker v. Bailey*, 16 Barb. 54; *Salinger v. Lusk*, 7 How. Pr. 430. Value, in detention of property should not be denied: *Connoss v. Meir*, 2 E. D. Smith, 314; *McKensie v. Farrell*, 4 Bosw. 193; *Woodruff v. Cook*, 25 Barb. 505; see, however, *Archer v. Boudinet*, 1 Code Rep. (N. S.) 373. As to where a denial upon information and belief is evasive of the issue tendered: See *Humphreys v. McCall*, 9 Cal. 59; *Brown v. Scott*, 25 Id. 194; *Vassault v. Austin*, 32 Id. 597; *Edwards v. Lent*, 8 How. Pr. 28; *Ketcham v. Zerega*, 1 E. D. Smith, 554; *Kellogg v. Baker*, 15 Abb. Pr. 287; *Taylor v. Luther*, 2 Sumn. 228. In a verified answer, an evasion of the controlling fact in issue is a strong circumstance against the defendant: *Baker v. Baker*, 13 Cal. 87.

48. A denial clearly evasive is insufficient to raise an issue: *Beebe v. Marvin*, 17 Abb. Pr. 194; *Lawrence v. Derby*, 24 How. Pr. 133; 15 Abb. Pr. 346. In order to determine whether the denials of an answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and

there is no admission in the answer inconsistent with this denial, an issue is fairly made: *Racouillat v. Rene*, 32 Cal. 450. If a cause is tried upon the theory that the answer denies the allegation of the complaint, the plaintiff will not be permitted to raise the objection in the Supreme Court, that the answer is insufficient in this respect: *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417.

49. An answer containing a different version of the transaction to that contained in the complaint is not a denial: *West v. Amer. Ex. Bk.*, 44 Barb. 176; as it does not specifically controvert the allegations contained in the complaint: *Wood v. Whiting*, 21 Barb. 190; *Levy v. Bend*, 1 E. D. Smith, 169; *Hamilton v. Hough*, 13 How. Pr. 14; *Corwin v. Corwin*, 9 Barb. 219; *Loosey v. Orser*, 4 Bosw. 392; see, as to its implying a denial of plaintiff's title to relief: *Peck v. Brown*, 26 How. Pr. 350. Where a defendant gives a different version of the matter in controversy, it should be accompanied by a specific denial of all the allegations of the complaint not consistent with the allegations in the answer: Compare *Dykers v. Woodward*, 7 How. Pr. 313.

50. A denial manifestly inconsistent with statements of fact in other parts of the same pleading is bad: *Livingston v. Harrison*, 2 E. D. Smith, 197. A mere denial of interest or ownership in the plaintiff will be insufficient where no statement of fact is made to sustain it: *Russell v. Clapp*, 7 Barb. 482; 4 How. Pr. 347.

51. Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negatived, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse, and not as an averment of new matter: *Frisch v. Caler*, 21 Cal. 71.

52. A denial which argumentatively disputes a fact averred in the complaint is demurrable, as the traverse must be direct: *Gallagher v. Dunlap*, 2 Nev. 326; *Mower v. Burdick*, 4 McLean, 7; *Frisbee v. Lindley*, 23 Ind. 511. Denials must not be in the alternative, as they are defective in form, and leave it uncertain what is denied: *Otis v. Ross*, 8 How. Pr. 193; *Corbin v. George*, 2 Abb. Pr. 467. A party cannot controvert the declaration he has made by deed:

Tartar v. Hall, 3 Cal. 263; *United States v. Thompson*, 1 Gall. 388. Under the provisions of section 453, Cal. Code C. P., denials contained in an answer, which do not explicitly traverse the material allegations of the complaint, may be stricken out on motion, as sham and irrelevant: *Tynan v. Walker*, 35 Cal. 634. Although a general denial of the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the Court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on the application of the plaintiff: *Fay v. Cobb*, 51 Id. 313.

ADMISSIONS IN THE ANSWER.

53. But no proof is required of facts admitted, or not denied: Cal. Code C. P., sec. 462; *Patterson v. Ely*, 19 Cal. 28. An admission in an answer is not avoided by a special averment of immaterial matter: *Reed v. Calderwood*, 32 Cal. 109. If the answer contains several defenses stated separately, an admission made in one answer, for the purpose of pleading a separate defense, does not destroy the effect of a denial of the matter thus admitted in another answer: *Siter v. Jewett*, 33 Cal. 92; *Swift v. Kingsley*, 24 Barb. 541.

54. When a defense is founded on a written instrument, and a copy is contained in the answer or annexed thereto, the genuineness and due execution will be deemed admitted, unless the plaintiff, within ten days after service of the answer, file with the Clerk and serve upon the defendant an affidavit denying the same; but not by a failure to controvert the same on oath, unless the plaintiff be permitted to inspect the original: Cal. Code C. P., secs. 448, 449. A plea which admits the execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue: *Thomas v. Page*, 3 McLean, 167.

55. Where the answer avers that defendant has in all respects faithfully kept the terms and complied with the conditions of the contract, but does not specifically deny the breaches set out in the complaint, if not demurred to, the plaintiff cannot claim that the allegations charging certain breaches are admitted: *Loler v. Cool*, 37 Mo. 85. Proceedings which are void by reason of the infirmity of the statute

under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal: *People v. Hastings*, 29 Cal. 449. An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer: *Taylor v. Randall*, 5 Cal. 79. And if a defendant in his answer admits a material allegation of the complaint, he is precluded from afterwards contesting it: *Howard v. Throckmorton*, 48 Id. 482; *Spanagel v. Reay*, 47 Id. 608.

ANSWER NOT EVIDENCE.

56. An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant: *Goodwin v. Hammond*, 13 Cal. 168; *Bostic v. Love*, 16 Id. 69. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him: *Fremont v. Seals*, 18 Cal. 433; *Blankman v. Vallejo*, 15 Id. 638. Omission to plead a defense specially is not cured by the introduction of evidence without objection in support of it: *Smith v. Owens*, 21 Cal. 11; *McComb v. Reed*, 28 Id. 281.

VERIFICATION OF ANSWER.

57. An answer unverified to a verified complaint may be stricken out on motion: *Drum v. Whiting*, 9 Cal. 422; 7 How. Pr. 36. But if the plaintiff goes to trial on the merits without objecting to the non-verification of the answer, he will not be allowed to raise the point in the Appellate Court: *McCullough v. Clark*, 41 Cal. 298. When the complaint is verified, or when the State, or any officer of the State, in his official capacity, is plaintiff, the answer shall be verified also: Cal. Code C. P., sec. 446; except when the admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor: Id.; N. Y. Code, sec. 523. By verification of the complaint the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer: *Brooks v. Chilton*, 6 Cal. 640.

58. A plea that denies the execution of the instrument, when required to be sworn to, if filed without affidavit, admits the execution of the instrument, but may be good for other purposes: Cal. Code C. P., sec. 447; *Horn v. Volcano Water Co.*, 13 Cal. 62; *McClintick v. Johnston*, 1 McLean, 414; 31 Cal. 73; 32 Id. 88; 33 Id. 473. Unless an inspection of the original is refused: Cal. Code C. P., sec. 449.

59. If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the statement of several causes of action in a complaint, or of several defenses in an answer, the party verifying it is guilty of perjury, and, on the trial, that averment which bears most strongly against the pleader will be taken as true: *Bell v. Brown*, 22 Cal. 671. Verification or affidavit to a plea held necessary in particular cases: *Bullock v. Van Pelt*, 1 Baldw. 463; *Contee v. Garner*, 2 Cranch C. Ct. 162; *Edmondson v. Barrell*, Id. 228; *Fenwick v. Grimes*, 5 Id. 603; *McClintick v. Cummins*, 2 McLean, 98; *Thomas v. Clark*, Id. 194; *Benedict v. Maynard*, 6 Id. 21.

60. It is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise: *Angier v. Musterson*, 6 Cal. 61. To a complaint verified the defendant filed a copy of the original verified answer, by mistake. Parties took deposition under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer: *Held*, that the court erred, and should have allowed the defendant to have verified his answer: *Arrington v. Tupper*, 10 Cal. 464.

NEW MATTER.

61. Under section 437 of the code, there are only two classes of defenses allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases: *Piercy*

v. *Sabin*, 10 Cal. 22. New matter is where defendant seeks to introduce into the case a defense not disclosed by the pleadings; something relied upon by him, but not put in issue by the plaintiff, and is such as defendant must affirmatively establish: *Id.*; *Bridges v. Paige*, 13 Cal. 640. Such matter must be specially pleaded: *Coles v. Soulsby*, 21 Cal. 47; *Morrell v. Irving Ins. Co.*, 33 N. Y. 429.

62. The code makes no difference in the classes of new matter, for whatever admits, either directly or by way of necessary implication, that a cause of action as stated in the complaint once existed, but at the same time avoids it and shows that it has ceased to exist, is new matter: *Piercy v. Sabin*, 10 Cal. 22; *Glazier v. Clift*, *Id.* 303; *Brazill v. Isham*, 2 Kern. 17; *Bellinger v. Craigue*, 31 Barb. 537; *Carter v. Koezley*, 14 Abb. Pr. 147; *Walrod v. Bennett*, 6 Barb. 144. But if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse: *Goddard v. Fulton*, 21 Cal. 430.

63. The code provides that: Second, The answer shall contain a statement of any new matter constituting a defense or counter claim: Cal. Code C. P. sec. 437, subd. 2.

64. The answer must allege those facts which, when the case of the plaintiff is admitted or proved, the defendant must prove in order to defeat a recovery: *Piercy v. Sabin*, 10 Cal. 22; *Glazier v. Clift*, *Id.* 303; *Ayrault v. Chamberlin*, 33 Barb. 237; *Jacobs v. Rensen*, 12 Abb. Pr. 390; *Pier v. Finch*, 29 Barb. 170; *Rapalee v. Stewart*, 27 N. Y. 310; *Fry v. Bennett*, 28 N. Y. 324; *Simmons v. Law*, 8 Bosw. 213; *Dingledein v. Third Av. R. R. Co.*, 9 Bosw. 79; *Beatty v. Swarthout*, 32 Barb. 293; *Horton v. Ruhling*, 3 Nev. 498.

65. Such allegations must be affirmatively established; therefore, if the *onus* of proof is thrown upon the defendant, it is new matter: *Thompson v. Lee*, 8 Cal. 275; *Piercy v. Sabin*, 10 Cal. 22. For under the Statute of California, the affirmative allegations of an answer stand controverted by the plaintiff, and the burden is on defendant to prove the truth of such allegations: Cal. Code C. P., sec. 462; *Bryan v. Maume*, 28 Cal. 238. To admit evidence of such new matter, therefore, it must be specially pleaded: *Walton v. Minturn*, 1 Cal. 362; *Piercy v. Sabin*, 10 Cal. 30; *Buck-*

man v. Brett, 13 Abb. Pr. 119; *Field v. Mayor of N. Y.*, 2 Seld. 179; *McKyring v. Bull*, 16 N. Y. 297; *N. Y. Cent. Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb. 468; *Sandford v. Travers*, 7 Bosw. 498; *Wright v. Delafield*, 25 N. Y. 266.

66. Affirmative allegations in the answer, in effect only denials, are not new matter: *Goddard v. Fulton*, 21 Cal. 430. For new matter confesses and avoids expressly or impliedly the cause of action set up in the complaint: *Simonton v. Winter*, 5 Pet. 140; *Greathouse v. Dunlap*, 3 McLean, 303; *Gregory v. Trainor*, 4 E. D. Smith, 58; *Anibal v. Hunter*, 6 How. Pr. 255; *Sayles v. Wooden*, Id. 84; *Lewis v. Kendall*, Id. 59; *Arthur v. Brooks*, 14 Barb. 533. An answer or a count seeking to avoid the cause of action stated in the complaint by new matter, should confess, directly or by implication, that but for the new matter, justification or avoidance, the action could be maintained: *Anson v. Dwight*, 18 Iowa, 241.

67. It is essential to the sufficiency of an answer stating new matter as a defense that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered: *Carter v. Koezley*, 9 Bosw. (N. Y.) 583. A special plea containing new matter, but with no appropriate conclusion, is bad upon special demurrer: *Leslie v. Harlow*, 18 N. H. 518. New matter occurring after issue joined must be set up by supplemental answer: *Jessup v. King*, 4 Cal. 331. A levy by a sheriff set forth in the answer as a defense is new matter: *Mulford v. Estudillo*, 23 Cal. 94.

WHAT MUST BE SPECIALLY PLEADED.

68. Abandonment of land: 30 Cal. 192; 26 Cal. 266. Abatement: 10 Cal. 555. As of another action pending: *Walsworth v. Johnson*, 41 Cal. 61; *Felch v. Beaudry*, 40 Id. 439; *Larco v. Clements*, 36 Id. 132; Cal. Code C. P., sec. 430, subd. 3, and sec. 433. Accord and satisfaction: *Sweet v. Burdett*, 40 Id. 97. Pleas in justification, as an attachment or execution: 7 Cal. 554; 15 Cal. 66; 10 Cal. 303; 12 Cal. 73; 19 Id. 112; 22 Cal. 650; 29 Cal. 529; 28 Cal. 281. Composition with creditors should be specially pleaded: 21 Cal. 11. A counter-claim should be specially pleaded: 9 Cal. 74. So of disclaimers: Code C. P., sec. 739; 14 Cal. 576; 27 Cal. 331. Equitable titles, defenses, and estoppels: 25 Cal.

597; 30 Cal. 439; 23 Cal. 354; 24 Cal. 124, 146; 42 Id. 346. Eviction must be specially pleaded: 10 Cal. 30. So, former recovery: 32 Cal. 176; must be specially set up in the answer.

69. Fraud must be specially pleaded: 27 Cal. 656. So, a grant of an easement or servitude: 27 Cal. 368. That plaintiff is not the real party in interest. Release: 17 Cal. 431. Statute of Frauds: 6 Cal. 149. Statute of Limitations: Cal. Code C. P., sec. 458; 23 Cal. 16; 27 Cal. 278; 19 Cal. 476. Subsequently acquired title: 30 Cal. 468. Tax titles: 22 Cal. 132; 27 Cal. 246. Unworkmanlike manner of doing work, 1 Cal. 371. Want of capacity to sue: 8 Cal. 585. That items are overcharged in an account: 13 Cal. 427. Prior claim to water in a third person must be specially pleaded: 9 Cal. 59.

MATTER IN AVOIDANCE.

70. The cases are so numerous where defendant should specially plead matters in avoidance or estoppel, that it is scarcely possible to make more than a reference to those coming under this general proposition. Matters in avoidance must be specially pleaded; they cannot be used as defenses, under an answer which is a simple denial of the allegations: *Gaskill v. Moore*, 4 Cal. 233. Matter of avoidance arising since suit brought, but pleaded at the first term at which the defendant appears, need not be pleaded *puis darrein continuance*: *Cutler v. Folsom*, 17 N. H. 139. Such a plea must have the same certainty as to time and place as other pleas, and if it does not allege the day on which the matter pleaded happens, it is bad: *Cummings v. Smith*, 50 Maine, 568. The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer: Cal. Code C. P., sec. 464.

71. A plea *puis darrein continuance* is a relinquishment of all preceding pleas: *Tunner v. Roberts*, 1 Mo. 416; 1 Burr. Pr. 424; 26 Vt. 305; *Wallace v. McConnell*, 13 Pet. 136; *Yeaton v. Lynn*, 5 Id. 223; *Spafford v. Woodruff*, 2 McLean, 191; *Good v. Davis*, Hempst. 16; *Wisdom v. Williams*, Id. 460; and its allowance is in the discretion of the court: *Nettles v. Sweazea*, 2 Mo. 100; *Thomas v. Van Doren*, 6 Mo. 201.

When this plea is adjudged bad on demurrer, judgment is final against the defendant: *McKeen v. Parker*, 51 Maine, 389.

PLEAS IN ABATEMENT.

72. A plea in abatement defeats the present proceeding: 1 Chitt. 145; but a plea in bar goes to the merits, and admits that plaintiff once had a right of action, but insists that it is determined: 1 Chitt. 469. And an answer in abatement, when taken with a plea in bar, cannot be made available: *Spencer v. Lapsley*, 20 How. U. S. 264; but under the N. Y. Code a plea in abatement is properly joined in the same answer with a defense in bar: *Sweet v. Tuttle*, 14 N. Y. 465; *Gardner v. Clark*, 21 Id. 399.

74. It is a bad mode of pleading to unite pleas in abatement, and pleas to the merits, and if, after pleas in abatement, a defense be interposed going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived: *Sheppard v. Graves*, 14 How. U. S. 505; *Fenwick v. Grimes*, 5 Cranch C. Ct. 603. Where there is a plea to the merits, and issue joined thereon, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement, and demurrers to them, are waived: *Bell v. R. R. Co.*, 4 Wall. U. S. 598. Under sec. 441 Cal. Code C. P., the defendant is permitted to set forth in his answer as many defenses as he may have. If certain matters, as another action pending, appear on the face of the complaint, the objection may be taken by demurrer; but if it does not so appear, it may be taken by answer. Matters in abatement are then proper in an answer, and may be pleaded with other defenses.

74. Matter in abatement which merely defeats the present proceeding must be specially set up in the answer, with such particularity as to exclude every conclusion to the contrary: *Hentsch v. Porter*, 10 Cal. 555; *Tooms v. Randall*, 3 Cal. 438. Such pleas are not favored. The party pleading them relies on technical law to defeat the plaintiff's action, and is held to "technical exactness in his pleading:" *Thompson v. Lyon*, 14 Cal. 42; *Larco v. Clements*, 36 Id. 132; *Anonymous*, Hempst. 215.

PLEAS IN BAR.

75. Wherever the subject-matter of the plea or defense is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar, and must be specially set up; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement: *Hentsch v. Porter*, 10 Cal. 555. Where a plea in answer is but notice of special matter by way of abatement, and goes to but part of the cause of action, it cannot be relied on as a plea in bar: *United States v. Dashiell*, 4 Wallace U. S. 182; *Leslie v. Harlow*, 18 N. H. 518; *Fitzsimmons v. City etc. Ins. Co.*, 18 Wis. 234.

76. It is not a sufficient objection to the plea, that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. In this respect there is a difference between pleas in bar and pleas in abatement: *Withers v. Greene*, 9 How. U. S. 213. Upon a hearing on an issue on a plea in bar to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact: *Hughes v. Blake*, 1 Mas. 515. Pleas in bar, which seek to avoid the equity of the case, are not to be favored: See *Piatt v. Oliver*, 1 McLean, 295.

77. An answer setting up in bar to a whole cause of action a matter which constitutes a bar to only a part of it, is bad: *Piatt v. Oliver*, 1 McLean, 295; *Lewis v. Baird*, 3 Id. 56; *McClintic v. Cary*, 22 Ind. 170; *Richardson v. Hickman*, Id. 244; *Postmaster-General v. Reeder*, 4 Wash. C. Ct. 678; *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544; and see *Parker v. Lewis*, Hempst. 72; *Peyatte v. English*, Id. 24. Where there are several items in a plea in bar, there must be enough items in the whole, each one well pleaded, to meet the whole of the demand: *Mullanphy v. Phillipson*, 1 Mo. 188.

78. An error in the prayer for judgment in a plea in bar

will not prevent the rendition of the judgment appropriate to the substance of the plea, confessed by general demurrer: *Withers v. Greene*, 9 How. U. S. 213. A plea to a bill in equity may be good in part, and not so in the whole; and the Court will allow it as to so much of the bill as it is properly applicable to, unless it has the vice of duplicity in it: *Kirkpatrick v. White*, 4 Wash. C. Ct. 595. So, if any one of several pleas, going to the whole merits of the case, is well pleaded, and contains a full and sufficient answer, it will entitle the defendant to judgment: *Brown v. Duchesne*, 2 Curt. C. Ct. 97; *Vermont v. Soci. for Prop.*, 2 Paine, 545.

EFFECT OF SPECIAL PLEAS.

79. A plea to the merits is a waiver of all pleas in abatement subsequent to it: *Winter v. Norton*, 1 Or. 42; *Potter v. Smith*, 7 Rhode Island, 55; *Potter v. James*, Id. 313; *Fugate v. Glasscock*, 7 Mo. 577. And of all former irregularities: *Bell v. Railroad Co.*, 4 Wall. 598. Hence it is too late to object that a writ has no seal after the defendant has pleaded to its merits: 7 R. I. 55. Or to a mistake in the writ, or variance between the count and the writ, which must be taken advantage of by a plea in abatement: *Chirac v. Reinicker*, 11 Wheat. 280; *McKenna v. Fisk*, 1 How. U. S. 241; compare *Burrow v. Dickson*, 1 Overt. 366. It cannot be taken advantage of on general demurrer: *Duvall v. Craig*, 2 Wheat. 45; *Wilder v. McCormick*, 2 Blatchf. 31; *Triplet v. Warfield*, 2 Cranch C. Ct. 237. Nor by motion in arrest of judgment: *Wilson v. Berry*, 2 Cranch C. Ct. 707. So of omission to indorse writ: *Miller v. Gages*, 4 McLean, 436. In California, the remedy for such variance is by motion.

80. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, nor in a *scire facias*: *Dickson v. Wilkinson*, 3 How. U. S. 57.

81. Special pleas, the averments of which amount only to the general issue, are bad: *Matthews v. Matthews*, 2 Curt. C. Ct. 105; *Halstead v. Lyon*, 2 McLean, 226; *Dibble v. Duncan*, Id. 553; *Curtis v. Central Railway*, 6 Id. 401; *Parker v. Lewis*, Hempst. 72; *Vowell v. Lyles*, 1 Cranch C. Ct. 329; *Liter v. Green*, 2 Wheat. 306; *Van Ness v. Forrest*, 8 Cranch

S. Ct. 30. A special plea, simply a traverse of a portion of the facts which plaintiff is bound to prove to establish a *prima facie* right to recover, is bad, as amounting to the general issue: *Knoebel v. Kircher*, 33 Ill. 308. In Alabama, it is no objection that a special plea presents matter of defense available under the general issue, which is also pleaded: *Hopkinson v. Shelton*, 37 Ala. 306.

82. Bad pleas which are cured by verdict are those which, although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all the material points of the declaration: *Garland v. Davis*, 4 How. U. S. 131. Where the pleas are bad, they should be demurred to by the plaintiff, and not traversed; but after the verdict of the jury, the same effect will be given to them as if they had been demurred to; and they are not aided by the fact that immaterial issues have been formed upon them, and found for the defendant: *Tams v. Lewis*, 42 Penn. 402. Where an averment in a plea purports to be made by the plaintiff, instead of the defendant, it is bad on demurrer: *Barclay v. Ross*, 32 Ill. 211.

CHAPTER II.

FORMS OF DENIALS IN ANSWER.

No. 555.

i. *General Denial—Positive.*

[TITLE.]

The defendant answers [or, if only a part of the defendants join, the defendants A. B. and C. D. answer] the complaint of the plaintiff herein, and denies generally and specifically each and every allegation in the said complaint contained.

1. Copyright Law.—Persons sued for any matter, act, or thing done under the copyright law, may plead the general issue, and give the special matter in evidence: U. S. Rev. Stat. Ed. 1875, sec. 4969.

2. Debt.—In an action on an indebtedness, the defendant, under the general denial, may prove that he was never indebted at all, or that he owes less than is claimed, or that services were rendered as a gratuity, in whole or in part, or that plaintiff had himself fixed a less price for his services than he claims to recover: *Schermerhorn v. Van Allen*, 18 Bar. 29; *Andrews v. Bond*,

16 Barb. 633. Denial of indebtedness alleged in the complaint held available as equivalent to plea of *nil debit*: *Simmons v. Sisson*, 26 N. Y. 264.

3. Definition.—A general denial is a denial in gross of all the allegations of the complaint: *Dennison v. Dennison*, 9 How. Pr. 246; *Seward v. Miller*, 6 Id. 312. Such a denial only puts in issue the allegations of the complaint: *Glazer v. Clift*, 10 Cal. 303; *Coles v. Soulsby*, 21 Cal. 47. Under Cal. Code C. P., sec. 437, if the complaint be verified, the answer must contain a specific denial of each allegation controverted.

4. Evidence, Admission of.—Under the general denial authorized by the Code, evidence of a distinct affirmative defense is not admissible. The defendant is limited to contradicting the plaintiff's proof, and disproving the case made by him: *Beatty v. Swarthout*, 32 Barb. 293.

5. Form of Denial.—The mere form of the denial is not material, provided it directly traverses the allegation which it is intended to meet: *Hill v. Smith*, 27 Cal. 476. "The defendant for answer says he denies," etc., is in form of expression unexceptional, and the court will not call in question the fact of denial: *Espinosa v. Gregory*, 40 Id. 58. A general denial, which "denies each and every allegation alleged in said complaint," is sufficient: *Kellogg v. Church*, 4 How. Pr. 339; but see *Dennison v. Dennison*, 9 How. Pr. 246; *Rosenthal v. Brush*, 1 Code R. (N. S.) 228; *Seward v. Miller*, 6 How. Pr. 312. But a denial of each and every material allegation of complaint is bad, as being evasive: *Mattison v. Smith*, 19 Abb. Pr. 288. The legal effect of such denials is not changed by expressions showing that they were intended to be specific: *Hensley v. Tartar*, 14 Cal. 508. The denial should not be of "all the allegations," but of "each and all," or, "each and every," and a denial of all the material allegations, though good on demurrer, is not sufficiently certain and specific: *Lewis v. Coulter*, 10 Ohio St. 451. "That no allegation thereof is true," was recommended by the code commissioners of New York. See Report, p. 128, for the reasoning thereon. "Denies each and every allegation in said complaint contained, not herein specifically admitted or specifically controverted," was sustained in *Parshall v. Tillou*, 13 How. Pr. 7; *Hunt v. Bennett*, 4 E. D. Smith, 647; *Davison v. Schermerhorn*, 1 Barb. 480. If several material matters are stated in the complaint conjunctively, an answer which undertakes to deny them as a whole conjunctively stated, is evasive, and an admission of the allegation attempted to be denied: *Doll v. Good*, 38 Cal. 287.

6. How to Deny.—There are but two forms in which a defendant can controvert the allegations of a verified complaint: First, Positively, when the facts are within his personal knowledge; and, Second, Upon information and belief, when they are not: *Curtis v. Richards*, 9 Cal. 33; *Gas Company v. San Francisco*, Id. 453. But now by Cal. Code C. P., sec. 437, he may also place his denial on the ground that he has no information or belief on the subject sufficient to answer the allegation in the complaint.

7. Rent.—Defendant may prove an eviction on a claim for rent in arrear, under the plea *nil debit*, or general denial: *McLaren v. Spaulding*, 2 Cal. 510; overruled in *Piercy v. Sabin*, 10 Cal. 30. And consequently an eviction must be set up in the answer.

8. When Allowed.—A defendant, after specifically admitting some of the allegations, may make a general denial as to the rest: *Parshall v. Tillou*,

13 How. Pr. 7; *Blaisdell v. Raymond*, 6 Abb. Pr. 148; *Smith v. Wells*, 20 How. Pr. 158; or as to all within certain specified folios: *Gassett v. Crocker*, 9 Abb. Pr. 39; *Blake v. Eldred*, 18 How. Pr. 240.

9. When Essential.—Where the facts alleged were presumptively within the defendant's knowledge, he must admit or deny positively, unless there be something special in the circumstances of the case: *Vassault v. Austin*, 32 Cal. 597; *Humphreys v. McCall*, 9 Cal. 59; *Brown v. Scott*, 25 Cal. 194; *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187; *Thorne v. The Same*, 10 How. Pr. 19; *Lewis v. Acker*, 11 How. Pr. 163; *Edwards v. Lent*, 8 How. Pr. 28; *Fales v. Hicks*, 12 How. Pr. 153; *Slater v. Maxwell*, 6 Wall. U. S. 268. So held in action for assault: *Richardson v. Wilton*, 4 Sand. 708. So of bond executed by defendant as surety: *Hance v. Remming*, 1 Code Rep. (N. S.) 204. So in contract, where complaint specifically alleges contract: *Ord v. Stmr. "Uncle Sam,"* 13 Cal. 369. So in defendant causing process to issue: *Lawrance v. Derby*, 15 Abb. Pr. 346. So of fact admitted by original defendant: *Forbes v. Waller*, 25 N. Y. 430. So of goods sold and delivered to partner: *Chapman v. Palmer*, 12 How. Pr. 38.

No. 556.

ii. General Denial as to part of a Pleading.

[TITLE.]

The defendant answers to the complaint:

I. That he denies each and every allegation contained in the paragraphs numbered.....and....., on folios..... and.....of plaintiff's complaint.

10. Part Denial.—Where the cause of action is divisible, or where several causes of action are stated, defendant in his answer may deny part or some, or one of the causes of action, and leave the residue unanswered: Cal. Code C. P., sec. 441; *Smith v. Shufeldt*, 3 Code Rep. 175; *Tracy v. Humphrey*, Id. 190; *Willis v. Taggard*, 6 How. Pr. 433; *Genessee Mut. Ins. Co. v. Moynihan*, 5 Id. 322; *Longworthy v. Knapp*, 4 Abb. Pr. 115; *Otis v. Ross*, 8 How. Pr. 193.

11. Part Denial, Effect of.—But the effect of partial denial will be limited to the precise ground covered: *Gas Co. v. San Francisco*, 9 Cal. 453; *Anable v. Conklin*, 25 N. Y. 470; affirming S. C., 16 Abb. Pr. 286; *Fairchild v. Rushmore*, 8 Bosw. 698.

No. 557.

iii. General Denial of One of Several Causes of Action.

[TITLE.]

The defendant answers to the first cause of action contained in the complaint herein, and denies each and every allegation in the complaint respecting the same.

No. 558.

iv. Denial by Articles.

[TITLE.]

The defendant answers to the complaint, and denies each and every allegation contained in the [third and fifth] articles thereof.

12. Indivisible Facts.—Where defendant relies on a state of facts single and indivisible, it is not necessary to separately and distinctly state and number each mitigating circumstance: *Kinyon v. Palmer*, 20 Iowa, 138.

13. Must be Specific.—If the pleadings are under oath, and the replications in response to a material averment of the answer undertake to deny, by saying "it is not true," etc., the replication is evasive, and does not specifically deny the averment: *Verzan v. McGregor*, 23 Cal. 339. And only such allegations should be denied as defendant intends to controvert: *Newell v. Doty*, 33 N. Y. 83. A denial cannot be made by implication: *West v. Am. Ex. Bank*, 44 Barb. 175. Each proposition should be separately denied: Cal. Code C. P., sec. 437; *More v. Del Valle*, 28 Cal. 170; *Fitch v. Bunch*, 30 Id. 208.

14. Several Grounds.—Nor should two or more grounds of defense be stated, when one of them would be as effectual in law as all of them: *Lord v. Tyler*, 14 Pick. 164. Such denials would be bad for duplicity, which must be avoided: *Hooper v. Jellison*, 22 Pick. 250; *Cahoon v. Bank of Utica*, 3 Seld. 486. A specific denial of one or more allegations, is held to be an admission of all others, well pleaded: *De Ro v. Cordes*, 4 Cal. 117; *Caulfield v. Sanders*, 17 Id. 569; *Whitlock v. McKechnie*, 1 Bosw. 427; *Pardee v. Schenck*, 11 How. Pr. 500; *Archer v. Boudinett*, 1 C. R. (N. S.) 372; *Corwin v. Corwin*, 9 Barb. 219; *Reilly v. Cook*, 22 How. Pr. 93; 13 Abb. Pr. 255; see *Walrod v. Bennett*, 6 Barb. 144; *Harbeck v. Craft*, 4 Duer, 122.

15. Single Defense.—Denials of several allegations are but one defense: *Otis v. Ross*, 8 How. Pr. 193.

16. Special Traverse.—A special traverse, as originally devised and used, was simply a mode by which the pleader in the inducement spread his own right or title upon the record, adding to this implied denial of the opposing claim a direct denial under the *absque hoc*: *Fox v. Nathans*, 32 Conn. 348. The inducement in such a traverse must on its face give the pleader a good right or title, or the whole plea is bad: *Id.*

17. Specific Application.—Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation: *Racouillat v. Rene*, 32 Cal. 450. A denial in an answer should by its words so describe the allegations of the complaint which the pleader intends to controvert, that any person of intelligence can identify them: *Mattison v. Smith*, 19 Abb. Pr. 288.

No. 559.

v. Denial of the Agreement Alleged.

[TITLE.]

The defendant answers to the plaintiff's complaint:

That he denies that he contracted or agreed with the said plaintiff in manner or form, as alleged in the complaint, or in any manner or form, or at all.

*No. 560.*vi. *Another Form.*

[TITLE.]

The defendant answers the complaint, and denies:

That he ever promised [or warranted, or covenanted] as alleged in the complaint [or that he ever made the agreement mentioned in the complaint, or any agreement, at any time or place].

*No. 561.*vii. *Another Form.*

[TITLE.]

The defendant answers to the plaintiff's complaint:

I. That he did not make with said plaintiff the said agreement by the said plaintiff set forth and alleged in his said complaint, and denies each and every allegation in said complaint in regard thereto.

*No. 562.*viii. *Controverting Conditions Precedent.*

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff did perform the conditions precedent of said [contract] on his part to be performed, or any one of them, or at all, or that he made any deposit, or tender, or [state what, as in the contract required.]

18. Conditions Precedent.—Objections that conditions have not been performed must be specially set up: *People v. Jackson*, 24 Cal. 632; *Happe v. Stout*, 2 Id. 460; *Rogers v. Cody*, 8 Id. 324.

19. Excuse for Non-performance.—Where performance is prevented by the act of the plaintiff, excuse for non-performance should be set out in the answer: *Garvey v. Fowler*, 4 Sand. 665; *Crist v. Armour*, 34 Barb. 378.

*No. 563.*ix. *Denial of Deed.*

[TITLE.]

The defendant answers the complaint, and denies:

That the deed mentioned therein is his deed, or that the defendant did execute such deed to the plaintiff, as alleged, or that the defendant did convey to the plaintiff the possession [or equity of redemption] in said premises as alleged, or at all.

20. On Information and Belief.—An allegation in an answer by an administrator that the defendant “avers, on information and belief, that no such deed or deeds were ever executed,” is a sufficient denial of an averment in the complaint that defendant’s intestate executed and delivered the particular deeds referred to: *Thompson v. Lynch*, 29 Cal. 189; *Roussin v. Stewart*, 33 Id. 208; *Jones v. City of Petaluma*, 36 Id. 230. That defendant may deny on information and belief in the New York practice, see *Sackett v. Havens*, 7 Abb. Pr. 371, note; *Davis v. Potter*, 4 How. Pr. 155; *Dunham v. Gates*, Hoffm. 185; but in *Therasson v. McSpedon*, 2 Hilt. 1, a denial upon information and belief was held not sufficient; see, also, *Hackett v. Richards*, 3 E. D. Smith, 13.

21. Effect of Admissions.—The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument: *Lee v. Evans*, 8 Cal. 424.

No. 564.

x. Denial of Conditional Delivery.

[TITLE.]

The defendant answers to the complaint, and denies:

That the said promissory note [or deed] was executed or delivered by the plaintiff, on the condition and understanding alleged, but avers that it was delivered by him absolutely and without condition.

No. 565.

xi. Denial of Demand.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff demanded the proceeds of the goods therein mentioned before the commencement of this action.

22. Contract.—In an action of contract, the defense that no demand was made before the commencement of the suit, cannot be taken advantage of, unless pleaded in the answer: *Rabsuhl v. Lack*, 35 Mo. 316.

23. Date.—A denial that the demand was made on a certain day, as alleged, is a denial that the demand was made on the particular day stated in the complaint, when the statement of the demand is not qualified as to the manner of its being made: *Hoopes v. Meyer*, 1 Nev. 433.

No. 566.

xii. Denial of Falsity.

[TITLE.]

The defendant answers to the complaint, and denies:

That the representations alleged to have been made by the defendant to the plaintiff were false; but on the con-

trary thereof avers that said representations, and each of them, were, and are true.

No. 567.

xiii. *Denial of Fraud.*

[TITLE.]

The defendant answers to the complaint, and denies:

That he made the said representations in manner and form as the same are in the said complaint alleged, or otherwise, or at all.

24. Denial of Fraud.—Defendant may deny fraud in a transaction which is actually tainted by it; for what constitutes fraud, particularly fraud in law, is often a matter of much diversity of opinion. But a general denial of fraud in answer to a bill of discovery is not enough; he, therefore, must answer to every material allegation: *Pettit v. Chandler*, 3 Wend. 618; 1 Paige, 427.

No. 568.

xiv. *The Same—Another Form.*

[TITLE.]

The defendant answers to the plaintiff's complaint, and denies:

That he [obtained the said deed from the plaintiff] by fraud and misrepresentation, in manner and form as the said plaintiff hath in his said complaint alleged, or by any fraud or misrepresentation whatever.

25. When Insufficient.—Such a general denial of fraud as the above is not enough where facts are alleged in the complaint from which the court may infer fraud. In such case the specific acts and representations alleged in the complaint must be each denied: *Litchfield v. Pelton*, 6 Barb. 187; *Dykers v. Woodard*, 7 How. Pr. 313; *Churchill v. Bennett*, 8 Id. 309.

No. 569.

xv. *Special Denial of Part Performance.*

[TITLE.]

The defendant answers to the complaint, and denies:

I. That he put plaintiff into, or consented to plaintiff's taking possession of the said premises, under and in part execution of the said pretended sale and contract of the said premises, as charged in said complaint, or at all.

II. The defendant avers that the said, of his own wrong, and without the license and against the consent of said defendant, entered into said premises, and occupied and improved the same.

*No. 570.**xvi. Denial of Partnership.*

[TITLE.]

The defendant answering the complaint, denies:

That the said [naming them], were partners as alleged [or that the said A. B. was a partner with the said [naming them] as assigned].

*No. 571.**xvii. Denial of Representations.*

[TITLE.]

The defendant answering the complaint, denies:

That he made the representations alleged, or any or either of them.

*No. 572.**xviii. Denial of Sale.*

[TITLE.]

The defendant answering the complaint, denies that he sold the to the plaintiff.

*No. 573.**xix. Denial of a Trust.*

[TITLE.]

The said defendant answers to the complaint of plaintiff:

And denies that he received the said, in said complaint mentioned, for the purposes and on the trusts aforesaid, or any of them, or in trust at all, in manner alleged in said complaint, or in any manner.

*No. 574.**xx. Another Form.*

[TITLE.]

The defendant answers to the complaint of plaintiff:

I. That the said plaintiff did not deliver, and the said defendant did not receive the said [describe what] in the said complaint mentioned, upon the trust and confidence therein alleged.

II. The said defendant avers that he received the same as and for his own property, absolutely, and without any trust thereto attached.

*No. 575.**i. Denial on Information and Belief.*

[TITLE.]

The defendant answers to the complaint:

That according to his information and belief, he denies generally and specifically each and every allegation in the plaintiff's complaint contained.

26. Belief.—Belief, as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information: *Humphreys v. McCall*, 9 Cal. 59. Belief may be founded on the statement of others, not competent witnesses, and not under oath: *Humphreys v. McCall*, 9 Cal. 59. Yet, if he has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony: *Id.* If the defendant is presumed to have knowledge of the matters alleged in the complaint, he must by a proper statement of facts and circumstances overcome the presumption of knowledge on his part, which being done, his answer on information and belief would be deemed all the law required: *Brown v. Scott*, 25 Id. 194; *Vassault v. Austin*, 32 Id. 606.

27. Damage.—A denial upon information and belief that the plaintiff suffered or sustained damages in the amount of twenty-five thousand dollars, and an averment, upon information and belief, that the plaintiff has not sustained any damage or damages whatsoever to exceed the sum of two thousand five hundred dollars, which sum, and none other, is admitted by defendant as the damages suffered, with an offer to pay the same, the pleadings not being verified, was not considered a model answer for imitation: *Chamon v. San Francisco*, Cal. Sup. Ct., Jul. T., 1869. It being the employment of negative averments instead of denials. But in *Hill v. Smith*, 27 Cal. 476, an answer of this character was upheld, upon the principle that the mere form of a denial is not material, provided it directly traverse the allegation which it is intended to meet. A denial of the full amount claimed, and admission of a certain amount to be due, and a tender of that amount, all properly go to constitute one defense: *Spencer v. Tooker*, 12 Abb. Pr. 354.

28. Judgment.—If the complaint aver the recovery of a judgment against one of several defendants, the court in which it was recovered, and the date and amount of the same, the defendants in their answer, may deny the same upon information and belief: *Vassault v. Austin*, 32 Cal. 597.

29. Recollection and Belief.—Where the plaintiff, in his bill, directly charged upon the defendant that he had made and entered into a certain agreement, a simple denial by the defendant in his answer, "according to his recollection and belief," is insufficient, and must be treated as a mere evasion: *Harr. Ch. Pr.* 181, 182; *Coop. Eq. Plead.* 341; *Taylor v. Luther*, 2 Sumn. 228.

30. Upon Information and Belief.—Where the denials are "upon his information and belief," instead of the statutory language "according to his information and belief," it may well be doubted whether the former mode of denial does not allow a little wider field for evasion, but it has been widely adopted by pleaders, and it is now settled that it is sufficient: *Vassault v. Austin*, 32 Cal. 606; *Roussin v. Stewart*, 33 Id. 211; *Jones v. City of Petaluma*, 36 Cal. 230; *Kirstein v. Malden*, 38 Cal. 150.

*No. 576.*ii. *Denial of Knowledge Sufficient to Form a Belief.*

[TITLE.]

The defendant answers to the complaint:

That he has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations in said complaint contained, and therefore he denies each and every of said allegations. [Or if confined to one allegation, after the word "answer" proceed] the allegation that [set out the allegation, or refer to it so as to clearly identify it]; and, therefore, denies the same.

31. Allegation of Ignorance.—A mere allegation of ignorance of the facts alleged will be insufficient to raise an issue, and the facts so attempted to be controverted will be held admitted: *Wood v. Stanuels*, 3 Code R. 152; *Elton v. Markham*, 20 Barb. 343; *Sayre v. Cushing*, 7 Abb. Pr. 371. In what cases a party may deny the allegation of a pleading from want of sufficient knowledge or information to form a belief, see *Lewis v. Acker*, 11 How. Pr. R. 163.

32. California Rule.—Under the former practice in California the defendant was not allowed to deny for want of information or belief, but now he may: Cal. Code C. P. sec. 437. He must answer positively, or state how it is that he is without knowledge of such facts: *Vassault v. Austin*, 32 Cal. 597; *Brown v. Scott*, 25 Cal. 189; *Richardson v. Wilton*, 4 Sandf. 708; *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187; *Fales v. Hick*, 12 How. Pr. 153. The duty of acquiring the requisite knowledge or information is imposed by statute on the defendant, to enable him to answer in the proper form: *Gas Co. v. San Francisco*, 9 Cal. 453; *Fish v. Redington*, 31 Id. 185; *Hance v. Remming*, 1 Code R. (N. S.) 204; *Mott v. Burnett*, 2 E. D. Smith, 50.

33. Forms Insufficient.—A denial of knowledge merely is not sufficient. If not positive, the denial must be of knowledge or information sufficient: *Edwards v. Lent*, 8 How. Pr. 28; *Ketcham v. Zerega*, 1 E. D. Smith, 553; *People v. McCumber*, 15 How. Pr. 189. That defendant "does not know of his information or otherwise:" *Sayre v. Cushing*, 7 Abb. Pr. 371; or that defendant "is not informed and cannot state:" *Elton v. Markham*, 20 Barb. 348; or "that defendant has no knowledge," or "that defendant is ignorant whether," or "that defendant has not sufficient knowledge or information whereon to found a belief," or "that defendant does not know or believe," are not sufficient denials: *Mott v. Burnett*, 1 Code R. (N. S.) 225; approved, 2 E. D. Smith, 50; *Robinson v. Woodgate*, 3 Edw. 422. Nor that he has no "recollection concerning it:" *Nichols v. Jones*, 6 How. Pr. 355. Nor "that he is ignorant of whether," etc.: *Wood v. Stanuels*, 3 Code, Rep. 152. But if he admitted his belief, he need not deny information: *Davis v. Mapes*, 2 Paige, 105. So, where he has the means of informing himself, such a denial would be insufficient: *Hance v. Remming*, 2 E. D. Smith, 48. But in other cases such a denial is sufficient in New York: *Dovan v. Dinsmore*, 33 Barb. 86; 29 How. Pr. 503; *Brown v. Ryckman*, 12 How. Pr. 313.

34. New York Rule.—A denial as to a material allegation, or as to all the allegations of a complaint, of any knowledge or information sufficient to form a belief, forms a complete issue: N. Y. Code, Ed. 1877, sec. 500; *Hutchings v. Moore*, 4 Met. (Ky.) 110; *Chadwick v. Booth*, 22 How. Pr. 23; 13 Abb. Pr. 247; *Caswell v. Bushnell*, 14 Barb. 393; *Sherman v. Bushnell*, 7 How. Pr. 171; *Duncan v. Lawrence*, 3 Bosw. 103; *Metropolitan Bank v. Lord*, 4 Duer, 630; *Townsend v. Platt*, 3 Abb. Pr. 325; *Flood v. Reynolds*, 13 How. Pr. 112; *King v. Ray*, 11 Paige, 236; *Leach v. Boynton*, 3 Abb. Pr. 3; *Wesson v. Judd*, 1 Abb. Pr. 254; *Temple v. Murray*, 6 How. Pr. 329.

35. Notice.—Where an answer denied “any knowledge or information sufficient to form a belief, whether or not a notice was served on” the defendant “as required by law,” it was held that the averment made issue only as to the lawfulness of the notice, and not as to the fact of notice: *Soeding v. Bartlett*, 35 Mo. 90.

36. Presumption of Knowledge.—When suit is upon a promissory note, it is presumed the defendant knows whether or not he made the note: *Gas Company v. San Francisco*, 9 Cal. 465. In an action to recover from the defendants a deposit made in their hands in California, it was alleged in the complaint that they were copartners, and as such, doing business in California, and elsewhere, as bankers and common carriers. The answer alleged that the defendants had never been in California, had never personally transacted business there, and had no personal knowledge and no information sufficient to form belief, and therefore denied that the plaintiff made such deposit: *Held*, that such allegation was not irrelevant. From the allegation in the complaint, without explanations, the presumption would be that the money was deposited with the defendants in person, and that they had personal knowledge thereof, and consequently they could not be permitted to deny that allegation on information and belief, without first rebutting the presumption; and the statement was relevant and proper for that purpose: *Dovan v. Dinsmore*, 20 How. Pr. 503.

37. Surplusage.—It is not necessary to add, “and therefore denies: *Flood v. Reynolds*, 13 How. Pr. 112; *Sackett v. Havens*, 7 Abb. Pr. 371; *Morris v. Parker*, 3 Johns. Ch. 297; unless it be acts of the defendant which are charged in the complaint: *Sloan v. Little*, 3 Paige, 103. But see Cal. Code C. P., sec. 437, which says he may place his denial on that ground.

38. When Insufficient.—A denial of any knowledge or information that the copy of the instrument set out in the complaint, was correct after admitting that an instrument of that character had been executed by defendant, was held a frivolous denial: *Wesson v. Judd*, 1 Abb. Pr. 254; see, however, *Kellogg v. Baker*, 15 Id. 287. Or that judgment was obtained against defendant: *Ketcham v. Zerega*, 1 E. D. Smith, 555. Or of a note made by partner: *Mott v. Burnett*, 1 Code Rep. (N. S.) 225; 2 E. D. Smith, 50. Or that the note was transferred by defendant: *Fales v. Hicks*, 12 How. Pr. 153. Or whether plaintiff is owner and holder of a note indorsed and delivered by defendant: *Kamlah v. Salter*, 6 Abb. Pr. 226; see, *contra*, *Temple v. Murray*, 6 How. Pr. 329; *Snyder v. White*, Id. 321; *Genessee Mut. Ins. Co. v. Moynihan*, 5 Id. 321. That an answer which denies that the defendant has any knowledge of the facts charged, without adding that he had no information or belief of them, is defective, see *Bradford v. Geiss*, 4 Wash. C. Ct. 513. The allega-

tion of the death of plaintiff's ancestor in a verified complaint is not sufficiently controverted by the averment in the answer "that defendant has not sufficient knowledge to form a belief," and therefore neither admits nor denies: *Anderson v. Parker*, 6 Cal. 197. The allegation must be positive that he has no information or belief sufficient to enable him to answer: Cal. Code C. P., sec. 437.

39. Written Instrument.—If the defendant admits that he executed an instrument upon which he is sued, he cannot deny information sufficient to form a belief as to the facts recited in the instrument, or that the instrument is correctly stated in the complaint. But he is entitled to an inspection of the original, to enable him to answer: *Wesson v. Judd*, 1 Abb. Pr. 254. But a party is not presumed to recollect the date or contents of a written instrument not in his possession: *Kellogg v. Baker*, 15 Abb. Pr. 286.

No. 577.

iii. *Another Form.*

[TITLE.]

Alleges that he has no knowledge or information other than is afforded by said [pleading], that [reciting allegation] and cannot therefore admit, but on the contrary he denies, etc.

40. Documents, Facts in.—Has no knowledge or information of certain facts except from certain documents, is insufficient, if they are not set forth and not answered according to belief: *Cuyler v. Bogert*, 3 Paige, 186.

41. Form of Denial.—This mode of denial is sanctioned by the code of Ohio; and this form is sustained by *State of Ohio ex rel. Treadwell v. Commissioners of Hancock*, 11 Ohio St. 183. But it would be useless as a denial under our practice, and on motion would be stricken out.

42. Several Denial.—Where the answer is verified, one defendant cannot deny knowledge, etc., on the part of the other. The denial, therefore, should in general be made severally: See *Kinkaid v. Kipp*, 1 Duer, 692.

43. Written Instrument.—In cases in which a copy of an instrument in writing is annexed to the petition as part thereof, the correctness of the copy cannot be regarded as the material allegation in the petition; but the petition is to be regarded as alleging the substantial effect of the instrument, which is shown by the copy. An answer must meet the allegations as if such was the form of the petition: *Bentley v. Dorcas*, 11 Ohio St. 398. This is the rule under the Ohio practice.

No. 578.

iv. *Denial of Knowledge, Explaining Cause of Ignorance.*

[TITLE.]

The defendant answers to the plaintiff's complaint:

I. That he denies that he has ever been within the State of, that he ever personally transacted any business therein.

II. Denies that he did at the time stated, or at any other time, do or say [state what].

44. Corporation—Acts of Agents.—Acts done by the agent of the defendant are also within this rule; and it applies to the case of a corporation defendant, for a corporation can as well know the acts of their agent as anything else: *Shearman v. New York Central Mills*, 1 Abb. Pr. 187, affirming *S. C. sub nom. Thorn v. New York Central Mills*, 10 How. Pr. 19.

CHAPTER III.

FORMS OF SPECIAL PLEAS.

No. 579.

Accord and Satisfaction.

[TITLE.]

The defendant answers to the complaint:

I. That on the day of, 187., at, he delivered to the plaintiff the promissory note of B. C. for dollars.

II. That the plaintiff accepted the same in full satisfaction and discharge of the claim [or demand] set up in the complaint.

1. Essential Averments.—A plea of accord and satisfaction must aver the payment and receipt in satisfaction: *Maze v. Miller*, 1 Wash. C. Ct. 338; *United States v. Clarke*, Hempst. 315; see Cal. Civ. Code secs. 1521 to 1524.

2. Form of Defense.—For a form in the defense of accord and satisfaction, see 2 Greenl. on Ev. 28; note and authorities there cited.

3. Insufficient Averment.—A mere readiness to perform the accord, or a tender of performance, or even part performance and readiness to perform the rest, is not enough: *Hearn v. Kiehl*, 38 Penn. 147. A plea which alleges that the defendant executed to the plaintiff a deed of certain property, which was to be absolute in case the note sued on was not paid by a certain day, without alleging that the deed was accepted as a satisfaction, is bad: *Shaw v. Burton*, 5 Mo. 478.

4. Must be Specially Plead.—Accord and satisfaction must be specially pleaded: *Piercy v. Sabin*, 10 Cal. 30; *Coles v. Soulsby*, 21 Id. 47; *Sweet v. Burdett*, 40 Id. 97. And evidence of the discharge of the debt sued on, pending the action, is admissible only under this plea: *Jessup v. King*, 4 Cal. 331. The plaintiff on an execution may receive promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate: *Mitchell v. Hackett*, 25 Cal. 542. An accord and satisfaction after issue joined must be pleaded specially as happening since the last continuance: *Good v. Davis*, Hempst. 16.

5. When Allowed.—This plea is allowed to be put in after the defendant has already pleaded, where some new matter of defense arises after issue joined, such as payment, a release by the plaintiff, the discharge of the defendant under an insolvent or bankrupt law, and the like: 2 Burr. L. Dict. 353; 3 Blk. Com. 316; 2 Tidd's Pr. 847; 1 Burr. Pr. 232; Steph. Pl. 64.

6. What is.—Acceptance of another as debtor: 1 Hun. 432. Action for part of an entire demand: 43 N. Y. 248. Payment of a less sum where the amount is disputed, but not otherwise: 47 How. Pr. 440. An agreement to receive some other thing instead of that specified in the contract, when executed, is good: 65 Barb. 161. Part payment and tender, held an unexecuted accord, and not a satisfaction: 51 N. Y. 270.

No. 580.

Alteration of Contract, Releasing Guarantor.

[TITLE.]

The defendant answers to the complaint:

I. That on the....day of....., 187., at....., the plaintiff agreed with C. D. in the complaint mentioned, in consideration of..... dollars, to extend the time of payment of the rent guarantied by the defendant....days.

II. That the defendant had no knowledge of the said extension, and did not then, nor has he since, assented thereto.

No. 581.

Another Action Pending.

[TITLE.]

The defendant answers to the complaint, and alleges:

That there was at the commencement of this action, and still is another action pending in the Court of the [describe the court], between the same parties, and for the same cause of action as that in the complaint herein stated and alleged.

7. Discontinuance—Effect of.—It would seem that under the decision of the New York courts a discontinuance of the other action, even after the answer, avoids this defense: *Beals v. Cameron*, 3 How. Pr. 414; *Averill v. Patterson*, 10 Id. 85.

8. Foreign Suit Pending.—That a prior suit *in personam*, between the same parties, and for the same cause of action, was pending in another state at the time of bringing the action, is not a defense: *Seever v. Clement*, 28 Md. 426. But the pendency of a suit between the same parties and respecting the same subject-matter, in another state, may be pleaded in abatement in the courts of the United States: *Ex parte Balch*, 3 McLean, 221. Where an appearance in a foreign attachment suit in another state is after the service of the writ in an action between the same parties in this state, the pendency of the foreign suit cannot be pleaded in bar or abatement of the action here: *Wilson v. Mechanics' Bank*, 45 Penn. 488.

9. Form of Plea.—For form of a plea of a foreign attachment, see *Wheeler v. Raymond*, 8 Cow. 311; *Russell v. Ruckman*, 3 E. D. Smith, 419; *Embree v. Hanna*, 5 Johns. 101; *Donovan v. Hunt*, 7 Abb. Pr. 29; *Hecker v. Mitchell*, 5 Id. 453.

10. Identity of Cause.—To sustain this defense, it must appear that the two actions are for the same identical cause; but where the plaintiff seeks to split an entire demand, and brings a suit for a part, and then another suit for the residue, the pendency of the former may be pleaded in abatement or bar of the second action: *Bendernagle v. Cocks*, 19 Wend. 207. Our practice discourages litigation by piecemeal.

11. Identity of Parties.—The defense of a prior *lis pendens* is available only where the plaintiff, at least, in both actions is the same: *O'Connor v. Blake*, 29 Cal. 312; *Walsworth v. Johnson*, 41 Id. 61. It is enough to state merely that the action was between the same parties. Describing the parties is unnecessary: *Ward v. Dewey*, 12 How. Pr. 193.

12. Verification Essential.—In a plea in abatement that a prior suit is pending the absence of an affidavit, verifying allegations in the plea that the parties and cause of action are the same, is fatal: 4 Hals. 83; *White v. Whitman*, 1 Curt. C. Ct. 494.

13. What must be Alleged.—In New York, it is not enough to allege service of process for the same cause, without showing a declaration or complaint for the same cause: *Gardner v. Clark*, 21 N. Y. 399. In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions: *Larco v. Clements*, 36 Cal. 132. If the second is brought on a title acquired after the commencement of the first, the defense will not avail: *Vance v. Olinger*, 27 Id. 358.

14. What must be Shown.—A plea to abate an action, by reason of another action pending, is not good unless it shows that the pending action was brought for the same cause as the one in which the plea is interposed: *Calaveras Co. v. Brockway*, 30 Cal. 325. To support a plea in abatement, founded on the pendency of a prior action, it is necessary to show that process was issued in such action: *Primm v. Gray*, 10 Cal. 522; see, also, *People v. De La Guerra*, 24 Id. 73. A plea which sets up, in bar of an action upon a contract, that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred: *Starr v. Moore*, 3 McLean, 354. A plea in abatement, setting up pendency of a prior suit, must show that the other court has jurisdiction of the action there pending: 10 Pick. 470; *White v. Whitman*, 1 Curt. C. Ct. 494; *Ex parte Balch*, 3 McLean, 221. It has been held in New York that the answer should show where the action is pending. But pendency of another action in a court of another state, or in a court of the United States, is not generally a good defense: *Cook v. Litchfield*, 5 Sandf. 330; *Burrows v. Miller*, 5 How. Pr. 51; and see *Republic of Mexico v. Arrangois*, 1 Abb. Pr. 437; *People v. The Sheriff*, 1 Park. Cr. 659; *Hecker v. Mitchell*, 5 Abb. Pr. 453; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Id. 99.

15. When Defense Lies.—A plea in abatement may be interposed to the entire action, on the ground that another suit was pending for the same cause of action, if the copy of the record be annexed. Still, the proofs must

show that the first cause of action is for the same matter sued for in the second suit: *Thompson v. Lyons*, 14 Cal. 42; *The People v. De La Guerra*, 24 Id. 73. It would also appear that proceedings other than an action—*e.g.*, by petition—may be pleaded as a defense, in the same way: See *Groshon v. Lyon*, 16 Barb. 461; and see *Ogden v. Bodle*, 2 Duer, 611.

16. When Defense will not Lie.—Where defendant pleads another suit pending, and it appears no summons was ever issued on the complaint, and there was no voluntary appearance on the part of the defendant: *Held*, that there was no suit pending: *Weaver v. Conger*, 10 Cal. 233; *Primm v. Gray*, Id. 522. So, where the complaint is so defective that a judgment entered thereon would be a nullity: *Reynolds v. Harris*, 9 Cal. 338. So, where the other suit pending was for only a part of the same matter sued for in the second suit: *Thompson v. Lyon*, 14 Cal. 39. The pendency of an action to quiet title to land will not abate a subsequent action between the same parties to recover possession of the same land, in which the same facts are litigated: *Bolton v. Landers*, 27 Id. 104. The plaintiff, at least, must be the same in both cases: *O'Connor v. Blake*, 29 Cal. 314; *Walsworth v. Johnson*, 41 Id. 61.

No. 582.

Arbitration and Award.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the day of, 187., the plaintiff and defendant [in writing] mutually submitted the demand set forth in the complaint to the arbitration of A. B. and C. D., and which said submission has never been revoked.

II. That on the day of, 187., at, the said A. B. and C. D. made and published their award [by which they declared the plaintiff not entitled to any part of his said demand].

[III. A copy of said submission and of said award is hereto attached, marked "Exhibit A," and made part hereof].

NOTE.—This applies more especially to the practice in New York.

17. Award Set Forth.—Although it may not be necessary to set forth its terms, its substance must be set forth so fully as to enable the court to say that if such an award was made the action is barred: *Gihon v. Levy*, 2 Duer, 176.

18. New Matter.—An award or former recovery for the same cause is new matter, which must be specially stated in the answer, and is not otherwise available, even though it appears by plaintiff's evidence: *Brazill v. Isham*, 12 N. Y. 9; 1 E. D. Smith, 437. The decision in 20 Barb. 460, turning on the same point was reversed on the ground that as plaintiff did not appear to have been misled or surprised, and not having objected that the evidence of a defense not pleaded was not admissible, he could not have the judgment reversed because it had been admitted: *N. Y. Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

19. Performance—When Alleged.—An award which merely settles the amount due cannot be pleaded in bar to the action without alleging performance; for the money until paid is due in respect of the original debt: *Brazill v. Isham*, 1 E. D. Smith, 437; questioned in 12 N.Y. 9. A submission of a cause to arbitration operates as a discontinuance: *Gunter v. Sanchez*, 1 Cal. 47; 18 Johns. 22; 13 Wend. 293.

No. 583.

Bankruptcy.

[TITLE.]

The defendant answers to the complaint:

I. That on the day of, 187., at, the United States District Court, of the District of, made and granted to the defendant a decree of discharge from his debts, as a bankrupt, of which decree of discharge a copy is annexed [annex copy of decree], and made a part hereof.

20. Bankruptcy.—The plea of bankruptcy is not favored, and may be defeated by proof of fraud: *Fellows v. Hall*, 3 McLean, 281. The bankruptcy of the plaintiff must be specially pleaded: *Cook v. Lansing*, 3 McLean, 571. So bankruptcy of the defendant must be specially pleaded: *Fellows v. Hall*, 3 McLean, 281; *Cutter v. Folsom*, 17 N. H. 139. It is not properly a plea in abatement, but it is rather a plea in bar; and until such plea is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant: *Fellows v. Hall*, 3 McLean, 281.

21. Bankruptcy of Plaintiff.—To a suit brought in the name of a bankrupt subsequent to the appointment of his assignee, the defendant may plead the bankruptcy of the plaintiff, and the appointment of the assignee, in abatement: *Cook v. Lansing*, 3 McLean, 571.

22. Debt.—It is not essential to admit the existence of the debt: *McCormic v. Pickering*, 4 N. Y. 276. But it should be averred to have been provable under the act: *Sackett v. Andross*, 5 Hill, 327. A special averment that the demand in suit was included in the list of creditors contained in the petition is unnecessary: *McCormic v. Pickering*, 4 N. Y. 276.

23. Discharge.—It has been held in New York, a plea of discharge under the voluntary provisions of the Bankrupt Act must aver positively that the defendant, at the time of presenting the petition, owed debts. Averring that the petition so alleged is not sufficient: *Varnum v. Wheeler*, 1 Den. 331; *Dresser v. Brooks*, 3 Barb. 429. In pleading an insolvent's discharge, it is not necessary to state the facts conferring jurisdiction on the officer who granted it: *Livingston v. Oaksmith*, 13 Abb. Pr. 183.

24. Excepted Class of Debts.—A plea that defendant did owe debts which are not within the excepted classes, and that he presented a petition, etc., imports that he was bankrupt within the act: *McNulty v. Frame*, 1 Sandf. 128.

25. Exceptions under the Act.—It should be averred that the plaintiff's debt did not arise by reason of a defalcation as a public officer, etc.,

which debts are excepted by the act: *Sackett v. Andross*, 5 Hill, 327; *Maples v. Burnside*, 1 Den. 332; *Dresser v. Brooks*, 3 Barb. 429. These decisions, as will be seen, were not made under the present Bankruptcy Act.

26. How Pleased.—A discharge duly granted under the Bankrupt Act of 1867 may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in *hæc verba*, as a full and complete bar to all suits brought, the certificate to be conclusive evidence of the facts of the discharge: Act of Congress, March 2, 1867; Sec. 5119 U. S. Rev. Stat. This is the rule to be followed in this class of answers. For form of pleading a discharge under the act of 1841, see *Ex parte Balch*, 3 McLean, 221; *White v. How*, Id. 291; see Chitty's Form of Practice, 110; *Seaman v. Stoughton*, 3 Barb. Ch. 344; *Johnson v. Fitzhugh*, Id. 360; *Morse v. Cloyes*, 11 Barb. 100; *Ruckman v. Cowell*, 1 N. Y. 505. For a brief form, see *Stephens v. Ely*, 6 Hill, 607.

27. Presentation of Papers.—A general allegation that such affidavits, schedules, and other necessary and proper papers as are required by the Bankrupt Act were presented, is not enough, but the plea should state what papers were presented: *Sackett v. Andross*, 5 Hill, 327. It should be averred that the petition of the bankrupt was presented to the court, and the discharge granted by the court, and not by the judge: *Gillon v. Bruen*, 5 N. Y. Leg. Obs. 227; *Sackett v. Andross*, 5 Hill, 327.

28. Voluntary Assignment.—A voluntary assignment by debtors for the benefit of their creditors, which would have been good at common law, and was permitted by the State Insolvency Law, was held valid, although the United States Bankrupt Law was in force, and applicable at the time of the assignment: *Hawkins' Appeal*, 34 Conn. 548; *Sedgwick v. Place*, Id. 552. The statute of California for the relief of insolvent debtors and protection of creditors, Hitt. C. & S. 15,505, is in conflict with the Federal Bankrupt Law, and has been suspended from the time the Bankrupt Law went into effect: *Martin v. Berry*, 37 Cal. 208. This statute was not repealed by the Code, and is now in force, the United States Bankrupt Law having been repealed. Debt resulting from the neglect of an attorney at law to pay over to his client money which he had collected for him is not a debt contracted while acting in a fiduciary capacity, and was not as such excepted from being discharged by a certificate under the United States Bankrupt Act of 1841: *Wolcott v. Hodge*, 15 Gray, 547.

No. 584.

The Same—By Composition Deed.

[TITLE.]

The defendant answers to the complaint:

I. That he admits that on the day of, 187., he was indebted to the plaintiffs, as alleged in the complaint.

II. That afterwards, on the day of, 187., at, the plaintiffs, by their deed under seal, agreed with the defendant that they would accept dollars, then and there paid them by the defendant, and by

the plaintiffs then and there accepted and received in full satisfaction of said indebtedness; and divers other creditors of the defendant then and there also, by the same deed, agreed to accept, and did accept, the sum currently with the said plaintiffs, in full satisfaction of the several debts of defendant to such creditors respectively, and covenanted with the defendant not to sue the defendant for such respective debts; a copy of which deed is hereto annexed as a part hereof. [Insert copy.]

29. Assignment.—For the allegations of an answer setting up an assignment for benefit of creditors made as a composition, see *Watkinson v. Ingleby*, 5 Johns. 386. Such a plea is bad on demurrer, if it does not aver payment or a tender of the composition, although it stated that defendant was always ready and willing to pay the same: *Fessard v. Mugnier*, 18 C. B. 286.

30. Renewal Notes.—For the allegations of an answer alleging composition by giving renewal notes which the plaintiff subsequently refused to receive, see *Warburg v. Wilcox*, 7 Abb. Pr. 336. A note given in consideration of an antecedent indebtedness does not *per se* discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note: *Smith v. Owens*, 21 Cal. 11.

31. Securities.—If the creditors of a failing debtor agree among themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor: *Smith v. Owens*, 21 Cal. 11.

No. 585.

Compromise.

[TITLE.]

The defendant answers to the complaint:

I. [State demand set up by plaintiff.]

II. That afterwards on the day of, 187., at, the defendant agreed to pay and the plaintiff agreed in writing to accept dollars, in full satisfaction of said claim, as a compromise thereof.

III. That on the day of, 187., at, the defendant paid and the plaintiff so accepted said sum.

See Cal. Civ. Code, sec. 1524.

No. 586.

Credit Unexpired.

[TITLE.]

The defendant answers to the complaint:

I. That the goods mentioned therein were sold to him

upon a credit of.....months from the.....day of
....., 187..

II. That such period had not elapsed before the commencement of this action.

32. How Pled.—An allegation in an answer that certain goods were sold on a credit which had not expired is a conclusion of law: *Levinson v. Schwartz*, 22 Cal. 229. The facts from which the conclusion is drawn should be stated. Such a plea is held to be not new matter requiring a reply, but a special denial that the defendant is indebted, as alleged in the complaint: *Gilbert v. Cram*, 12 How. Pr. 455.

33. Must be Specially Pled.—It would seem that in Pennsylvania, the fact that a suit was brought in violation of an agreement to give time is not a reason for dismissing the action. It should have been regularly pleaded and tried: *Murdock v. Steiner*, 45 Penn. 349. A covenant not to sue for five years is no bar to an action within that time: *Howland v. Marvin*, 5 Cal. 501.

34. Objection, how Taken.—The objection that the suit was commenced before the cause of action accrued should be taken by answer: *Smith v. Holmes*, 19 N. Y. 271.

No. 587.

Death of Defendant Before Suit.

[TITLE.]

The defendant C. D. answers to the complaint:

That A. B., one of the defendants in this action, died at
....., before this action, and on or about the.....
day of.....

35. Action will not Abate.—An action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survives. But the court on motion may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the person to whom the transfer is made may be substituted: Cal. Code C. P., sec. 385; N. Y. Code, ed. 1877, sec. 755; Laws of Oregon, secs. 37, 38; Idaho, sec. 16; Nevada, sec. 16; Wash. T., sec. 17; 2 Whitt. Pr. sec. 204. Section 387, Cal. Code C. P., gives a party the right to intervene during the pendency of suit, either before or after issue joined: See *Brooks v. Hager*, 5 Cal. 281.

36. Cause of Action.—Whether the cause of action survives on the death of a party depends upon local law: *Hatfield v. Bushnell*, 1 Blatchf. 393. But an action for a penalty and causes of action *ex delicto* die with the defendant: *Jones v. Vanzant*, 4 McLean, 604; *Henshaw v. Miller*, 17 How. U. S. 212. So, actions in trespass do not survive: *Dyckman v. Allen*, 2 How. Pr. 17. This section applies only where the cause of action survives against the surviving defendant: *Williams v. Kent*, 15 Wend. 360. Although technically sounding in tort, an action for injury to property survives under New York statute in the same manner as an action on contract: *Haight v. Hayt*, 19 N. Y. 464.

37. Common Law Rule.—The statute has changed the practice in this respect, for at common law all personal actions die with the party: *Wilbur v. Gilmore*, 21 Pick. 250. So, at common law, in actions *ex delicto*, where the wrong-doer acquired no real gain, although the injured party may have much loss, the death of either party destroyed the right of action: *Middleton v. Robinson*, 1 Bay R. 58; *Millen v. Baldwin*, 4 Mass. 480; *Holmes v. Moore*, 5 Pick. R. 257.

38. Death of Sole Plaintiff.—On the death of a sole plaintiff, the action may be continued in the name of the representative of the decedent: *Ridgeway v. Bulkeley*, 7 How. Pr. 269; *Banta v. Marcellus*, 2 Barb. 373; *Bain v. Pine*, 1 Hill, 616; *Jarvis v. Felch*, 14 Abb. Pr. 46; *Reed v. Butler*, 11 Abb. Pr. 128.

39. Death of Sole Defendant.—On the death of sole defendant before verdict or judgment, his representatives cannot be substituted against the wishes of plaintiff, unless the defendant had acquired some rights in the litigation, as where a counter-claim has been pleaded: *Livermore v. Bainbridge*, 61 Barb. 358. An action in such case for the recovery of possession of specific personal or real property wholly abates: *Hopkins v. Adams*, 5 Abb. Pr. 351; *Mosely v. Mosely*, 11 Abb. Pr. 105; *Putnam v. Van Buren*, 7 How. Pr. 31; *Mosely v. Albany N. R. R. Co.*, 14 How. Pr. 71. It is otherwise in California. Section 1584 of the Code C. P. provides that "any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate, who, in his life-time, has wasted, destroyed, taken or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person." In an action to recover damages for death by a wrongful act, the action may be continued against personal representatives of defendant: *Yertore v. Wiswall*, 16 How. Pr. 8; *Doedt v. Wiswall*, 15 How. Pr. 128.

40. Death of One of Several Defendants.—In case of the death of one of several defendants, the action may be continued as to the others: *Gardner v. Walker*, 22 How. Pr. 405; *Gordon v. Sterling*, 13 How. Pr. 405. Where defendants are executors, trustees, joint-tenants, or copartners, the action continues against the survivors: *Lachaise v. Libby*, 13 Abb. Pr. 7; *Bucknam v. Brett*, 13 Abb. Pr. 119.

41. Death of Husband.—A wife may proceed or not, at her election, and is not liable for costs if she refuses: 2 Dick. 866; Mitf. Pl. 59; *Dewall v. Covenhoven*, 5 Paige, 581. A demand in right of the wife does not abate on death of the husband: *Id.*; *McDowl v. Charles*, 6 Johns. Ch. 132. If, after decree of divorce, directing division of common property, the husband dies, the heirs must be substituted as parties in his stead: *Ewald v. Corbett*, 32 Cal. 493.

42. Death of Wife.—An action against husband and wife, for the debt of the wife contracted while a *feme sole*, abates on her death, before judgment: *Williams v. Kent*, 15 Wend. 360. The death of a wife without issue living defeats a recovery by the husband in an action for the homestead: *Gee v. Moore*, 14 Cal. 472.

43. Death of Appellant.—In action on a personal tort, on the death of appellant during appeal from a judgment against him, the appeal may be continued by his representatives in their name: *Miller v. Gunn*, 7 How. Pr.

159; but see *Hastings v. McKinley*, 8 Id. 175. In writs of error in the United States Supreme Court, see *Green v. Watkins*, 6 Wheat. 260; *McKinney v. Carroll*, 12 Pet. 66. As to limitation of time for suggestion of death, see *Phillips v. Preston*, 11 How. U. S. 294. The death of appellant, after argument of the case upon appeal, does not constitute a ground for delaying decision or departing from the ordinary course of procedure. Judgment may be entered, but it should be on a day anterior to appellant's death: *Black v. Shaw*, 20 Cal. 68; *Beach v. Gregory*, 2 Abb. Pr. 203.

44. Death before Trial.—Where plaintiff in an action died before trial, and the subsequent order for judgment contained a recital as follows: "This action having been continued, in consequence of death of plaintiff, by his executor, Samuel Webb, and jury having found verdict for plaintiff, and then awarded judgment in favor of plaintiff:" *Held*, that the recital sufficiently showed a suggestion of death of original plaintiff, and continuance and revival of the cause in the name of the executor: *Sanchez v. Roach*, 5 Cal. 248; *Gregory v. Haynes*, 21 Id. 443.

45. Death before Argument.—The rule is different if the death occurs previous to argument. In that event, proceedings can only be had upon leave given after suggestion of death is made: *Black v. Shaw*, 20 Cal. 68; *Warren v. Eddy*, 13 Abb. Pr. 28.

46. Death after Verdict.—Where a party to an action dies after verdict or other decision thereon, judgment in pursuance of such verdict or decision may nevertheless be rendered, as provided in section 202 of the Practice Act (Sec. 669 Cal. Code C. P.); but in no other such case can judgment be rendered so as to affect the interests of the representatives or successors of the party deceased, without the proper substitution of such representative or successors: *Judson v. Love*, 35 Cal. 463.

47. Death before Judgment.—Death of defendant before judgment destroys the lien of an attachment, and the property passes into possession of the administrator: *Myers v. Mott*, 29 Cal. 359; *Hensley v. Morgan*, 47 Id. 622; *Ham v. Cunningham*, 50 Id. 365. The death of a party before judgment, when presumed, though not proved, renders any subsequent proceedings irregular: *Gerry v. Post*, 13 How. Pr. 118. The death of a party after hearing, but before actual decision, works no abatement; judgment may be entered *nunc pro tunc*: *Ehle v. Moyer*, 8 How. Pr. 244; *Diefendorf v. House*, 9 Id. 243; *Crawford v. Wilson*, 4 Barb. 504.

48. Death after Judgment.—Death of party after decree works no abatement: *Cowell v. Buckelew*, 14 Cal. 641; *Thwing v. Thwing*, 18 How. Pr. 458; 9 Abb. Pr. 323; *Lynde v. O'Donnell*, 21 How. Pr. 34; 12 Abb. Pr. 256.

49. Death Pending Supplementary Proceedings.—The proceedings abate on the death of sole judgment-debtor: *Hasewell v. Penman*, 2 Abb. Pr. 230.

50. Equity.—In equity the suit does not abate by death of a co-plaintiff or co-defendant; the suit may be amended by adding the necessary parties: *Fisher v. Rutherford*, Baldw. 188.

51. Party Civilly Dead.—When plaintiff or defendant is sentenced to state prison, the action abates: *Graham v. Adams*, 2 Johns. Cas. 408; *O'Brien v. Hagan*, 1 Duer, 664. But this cannot be pleaded by the party so civilly dead, it must be by his representatives: *Freeman v. Frank*, 10 Abb. Pr. 370.

52. Suggestion of Death.—It is regular and proper to suggest the death of a party to an action in any court, and at any stage of the proceedings, and the death of a party occurring before the appeal taken may be shown in the appellate court by affidavit of the fact: *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 Id. 96; *Taylor v. Western P. R. R. Co.*, 45 Id. 337.

No. 588.

Duress.

[TITLE.]

The defendant answers to the complaint:

I. That the [bond] mentioned therein was extorted from him by threats of personal violence, and was executed by him under fear of the same [or from fear while in prison, etc.; state force, etc.]

II. That the said [bond] was executed by him without any consideration therefor.

53. Duress.—Duress is personal restraint, or fear of personal injury or imprisonment: 2 Metc. (Ky.) 445. Duress of imprisonment is where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond: 9 Johns. 201; 10 Pet. 137. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or deed, this is not by duress of imprisonment, and he is not at liberty to avoid it: Coke, 2 Inst. 482; 3 Caines, 168; 6 Mass. 511; 17 Me. 338.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon sufficient reason: 1 Blk. Comm. 131. Lord Coke adds to these fear of imprisonment: Coke, 2 Inst. 483. In order to avoid a note on the ground that it was procured by menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment, and that the maker was put in fear of such imprisonment, and was thereby induced to execute it: *Knapp v. Hyde*, 60 Barb. 80; see, also, *Landa v. Obert*, 45 Texas, 539. An abuse of process against the person, to compel a party to do any act against his will, is a duress, and the act done may be avoided: *Breck v. Blanchard*, 22 N. H. 303. It has been held that a restraint of goods under circumstances of hardship will avoid a contract: 9 Johns. N. Y. 201; 10 Pet. 137; but see 2 Metc. Ky. 445; 2 Gall. C. C. 337. In the case of violence or threats, the age, sex, state of health, etc., must be taken into consideration; and they are grounds of avoiding the contract not only when they are exercised on the contracting party in person, but when the wife, the husband, the descendants or ancestors of the party are the object of them. Duress cannot be pleaded by a stranger: *McClintick v. Cummins*, 3 McLean, 158. "Duress consists in: 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; 2. Unlawful detention of the property of any such person; or, confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive:" Cal. Civ. Code, sec. 1569. As to menace, see Id., sec. 1570.

*No. 589.**Former Judgment.*

[TITLE.]

The defendant answers to the complaint:

That on the....day of....., 187..., at, in an action then pending in the.... Court, between A. B., plaintiff, and C. D., defendant, and for the same cause of action as that set forth in the complaint herein, judgment was duly given and made [describe the judgment].

54. Dismissal of Suit.—A dismissal of the complaint upon the merits bars a fresh action, especially where the complaint is in equity: *Bostwick v. Abbott*, 40 Barb. 331; 16 Abb. Pr. 417. Dismissal of suit to obtain probate of a will is no bar to introduction of evidence to show its fraudulent destruction, to establish title in partition: *Harris v. Harris*, 26 N. Y. 433. But judgment of dismissal of premature suit is no bar to a fresh action on the demand, when matured: *Wilcox v. Lee*, 26 How. Pr. 418; 1 Abb. Pr. (N. S.) 250. So, also, dismissal on ground of want of capacity to sue is no bar to subsequent action legally instituted: *Robbins v. Wells*, 26 How. Pr. 15; 18 Abb. Pr. 191. And when dismissal of complaint is relied upon in bar, it must be shown that it was a judicial determination of the same point: *Smith v. Ferris*, 1 Daly, 18. Ordinarily, where an action is dismissed without any judicial determination of the controversy, it is no bar to another suit.

55. Effect of Former Judgment.—Where a court in a former action between the same parties had jurisdiction over the subject and the parties, and the questions of fact were the same as in the subsequent action, and were necessary to its decision, and either were or might have been litigated in the suit, and the final hearing was upon its merits, the judgment is *res adjudicata* as to all those things that were, or, under the pleadings, might have been controverted in that action whose adjudication was necessary to the final disposition of the case: *Keene v. Clark*, 5 Rob. 38. A judgment in a former action is well pleaded as a bar in a second action, provided the cause of action is the same, though the form of action had been changed: *Taylor v. Castle*, 42 Cal. 367. The cause of action is said to be the same as that in a former suit, where the same evidence would support both actions: *Id.* Recovery of judgment against a firm upon a contract fraudulently induced by one member, is no bar to an action against that member for the fraud: *Goldberg v. Dougherty*, 39 N. Y. Supr. (7 J. & Sp.) 189. In actions *ex delicto*, see 53 N. Y. (8 Sickles) 64.

56. Effect of Plea.—If parties go to trial on a plea of former recovery in an attachment execution, without a replication, this does not amount to a confession of the truth of the facts stated in the plea: *Tams v. Bullitt*, 35 Penn. 308.

57. Essential Allegations.—It is generally necessary to allege that the former judgment is in full force, but it may sufficiently appear by implication: *Southern Life Ins. and Trust Co. v. Davis*, 4 Edw. 588. In Iowa and Indiana, such a plea must be accompanied with an exhibit of the record: 19 Ind. 392;

11 Iowa, 480. A plea cannot contradict the record of a former suit. Errors in the original suit should have been corrected as they occurred: *Hall v. Singer*, 3 McLean, 17.

58. Foreign Adjudication.—If defendant relies upon proceedings under the statute of another State, he must set out the statute, that the court may see whether the proceedings were warranted by the statute or not; and the general allegation that the proceedings were pursuant to the statute is not sufficient: *Walker v. Maxwell*, 1 Mass. 104; *Holmes v. Broughton*, 10 Wend. 75.

59. Foreign Judgment.—A plea which sets up a foreign judgment must contain an allegation that the court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the court had jurisdiction: *Burnham v. Webster*, Davies, 236. Judgment of a foreign tribunal, having full cognizance of the same controversy, held conclusive upon the merits, and only impeachable for want of jurisdiction or fraud: *Lazier v. Westcott*, 26 N. Y. 146; *Phillips v. Godfrey*, 7 Bosw. 150; *Jarvis v. Sewall*, 40 Barb. 449; see *Taylor v. Shew*, 39 Cal. 539.

60. Forms of Plea.—For a plea of an adjudication that the assignment under which plaintiffs claimed was fraudulent and void, see *Southern Life Ins. Trust Co. v. Davis*, 4 Edw. 588. Under what plea former adjudication may be presented as a defense, see *Welsh v. Lindo*, 1 Cranch C. Ct. 508. For an insufficient plea of attachment in former action, see *New England Screw Co. v. Bliven*, 3 Blatchf. 240; compare *Stone v. Stone*, 2 Cranch C. Ct. 119. A plea which sets up in bar of an action upon a contract that property was attached in a previous suit to answer for the same demand, and was lost, should show how the loss occurred: *Starr v. Moore*, 3 McLean, 354.

61. How Pled.—Where a judgment in a prior suit is set up in defense to an action, a complete record of all the pleadings and proceedings in the case in which it was rendered should be made part of the answer: *Williamson v. Foreman*, 23 Ind. 540; *Ringle v. Weston*, Id. 588. The rule that a decree must be enrolled before it can be pleaded in bar of a second bill for the same matter, is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud: *Pearse v. Dobinson*, Law Rep. 1 Eq. 244.

62. Must be Specially Pled.—A judgment in a former suit between the same parties, for the same cause, and in the same form, is a bar to any other suit: *McKnight v. Taylor*, 1 Mo. 282. But such judgment must be specially pleaded: *Love v. Waltz*, 7 Cal. 250; *Piercy v. Sabin*, 10 Id. 22; *Vance v. Olinger*, 27 Id. 358; *Marshall v. Shafter*, 32 Id. 176; *Brazill v. Isham*, 2 Kern. 17; *Richardson v. Hickman*, 22 Ind. 244; see *Welsh v. Lindo*, 1 Cranch C. Ct. 508. For evidence of a former recovery for the same cause of action cannot be given in any action whatever, under an answer containing only denials of the complaint, or an allegation of the pendency of another action: N. Y. Code, ed. 1877, sec. 500; *Hendricks v. Decker*, 35 Barb. 298. The rule of the old practice, permitting such evidence to be given under the general issue in actions of ejectment and trover: 2 Hill, 478; 5 Id. 61; 6 Id. 125; 6 Wend. 284; 9 Id. 9, is abrogated by the code: *Hendricks v. Decker*, 35 Barb. 298. If there is no opportunity to plead it, it may be put in evidence: *Flandreau v. Downey*, 23 Cal. 358; *Clink v. Thurston*, 47 Id. 29. It

may be pleaded in an equity suit: *San Francisco v. S. V. W. W.*, 39 Id. 482. Whether pleaded or not it must be proved in evidence: *People v. De La Guerra*, 24 Id. 78. It may be waived: *Semple v. Ware*, 42 Id. 621.

63. Parties.—If the parties are not the same, allegations to show their privity with the present parties must be inserted: *Goddard v. Benson*, 15 Abb. Pr. 191.

64. Offer of Testimony in Former Suit.—The judgment or decree of a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings: *La Guen v. Gouverneur*, 1 John. Cas. 436, approved in *Bruen v. Hone*, 2 Barb. 596; *Southgate v. Montgomery*, 1 Paige, 47; *Simpson v. Hart*, 14 John. 77. The rule is, however, more properly and less broadly stated in *Miller v. Manice*, 6 Hill, 121, a case where the general declaration embraced several causes of action. It was held that the plaintiff in a second suit may show that he “offered” no evidence as to one of the causes, and that the cause went to the jury upon a different part of his claim from that for which his second suit is brought, in which case the judgment in the first will be no bar to the second. But where he attempts to give evidence, and submits the question to the jury without withdrawing any part of his claim, the defendant may insist upon the first judgment as a bar: *Barnum v. Reynolds*, 38 Cal. 643.

65. When a Bar.—A former judgment rendered in an action tried upon its merits, between the same parties, and upon the same subject-matter, is, if properly pleaded, an effectual bar to another action between the same parties on the same cause; but it is no defense to a cause of action accrued after the rendition of such judgment: *Jones v. City of Petaluma*, 36 Cal. 230; *Barnum v. Reynolds*, 38 Id. 643. Where the same subject-matter has been fairly put in issue and once tried upon its merits, it cannot be again litigated, and a former judgment is a bar so long as it remains unreversed: *McKnight v. Taylor*, 1 Mo. 282; *San Francisco v. S. V. W. W.*, 39 Cal. 473; *Etcheborne v. Auxerais*, 45 Id. 121; *Rahn v. Minnis*, 40 Id. 422. A judgment in a justice’s court for damages caused by the alleged diversion of a stream of water is a bar to a subsequent action in the supreme [district] court involving the same issues: *Boyer v. Schofield*, 2 Keyes, 628. Adjudication in former suit conclusive as to defense then existent, but not so as to another subsequently arising, and which could not then have been interposed: *Smith v. McCluskey*, 45 Barb. 610; see Cal. Code C. P., sec. 1908, declaring the effect of a judgment or final order in an action or special proceeding. Consult 24 Cal. 466; 37 Id. 238; 21 Id. 164; 44 Id. 635.

66. When not a Bar.—A judgment in a former action is not a bar to a subsequent action, although the pleadings present the same matter, if it appears either by the record, or it seems, by extraneous evidence, that the matter in question was not litigated, and actual evidence was not given as to it, and it was not submitted to the court, but that the trial and verdict proceeded upon other grounds: *Burwell v. Knight*, 51 Barb. 267. A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit: *Hughes v. United States*, 4 Wall. U. S. 232; see, also, *Tutton v. Adams*, 45 Penn. 67. A judgment against one of two several obligors without satisfaction is no bar to an action against the other: *Armstrong v. Prewett*, 5 Mo. 476. In an action against an infant for damages, a judgment of discontinu-

ance in a former action for the same cause brought in the court of a justice of the peace, the judgment being rendered on the ground that the defendant was an infant and no guardian had been appointed, is no bar. A justice has no jurisdiction to proceed against an infant defendant, after the return of process, until a guardian has been appointed: *Harvey v. Large*, 51 Barb. 222. When the court rendering judgment has failed to acquire jurisdiction over the person or subject-matter in controversy, its action is null, and no bar to future proceeding: *Sagendorph v. Schult*, 41 Barb. 102; *Gage v. Hill*, 43 Id. 44; *Porter v. Bronson*, 29 How. Pr. 292; 19 Abb. Pr. 236. So, also, where such court has not exercised its jurisdiction within the limits imposed by statute: *Bloomer v. Merrill*, 29 How. Pr. 259.

67. When an Estoppel.—If on the case made by the complaint, the defendant is not called upon or has no opportunity to plead a former judgment as an estoppel, it may be received in evidence as matter of estoppel without having been pleaded: *Jackson v. Lodge*, 36 Cal. 28; *Clink v. Thurston*, 47 Id. 29. A judgment to operate as an estoppel must be a judgment of a court of competent jurisdiction, upon the same subject-matter, in a cause regularly tried on its merits, upon issue duly joined by proper pleadings in such court, between the same parties or their privies: *Boggs v. Clark*, 37 Cal. 236. Suffering judgment for whole amount claimed by plaintiff held to estop defendant from bringing subsequent suit for an omitted credit, which he might have set up as a defense: *Binck v. Wood*, 43 Barb. 315. And recovery of part of an entire demand estops any suit being brought for the residue: *Hopf v. Myers*, 42 Barb. 270; *Bancroft v. Winspear*, 44 Id. 209. Disallowance of claim, as set-off in one action, estops another being brought for it: *Rogers v. Rogers*, 1 Daly, 194; see, also, as to similar effect of setting up demand by way of counter-claim: *Collyer v. Collins*, 17 Abb. Pr. 467. A judgment obtained *pendente lite* in an action previously brought may operate as an estoppel: *Bank of Beloit v. Beale*, 7 Bosw. 61; see, on the other hand, as to course to be pursued when judgment relied upon as an estoppel is reversed *pendente lite*: *Gilchrist v. Comfort*, 26 How. Pr. 394.

No. 590.

Fraud.

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff induced him to make the note mentioned in the complaint, by representing that he was authorized by one A. B., to whom the defendant owed the amount of the same, to take a note to himself in satisfaction of such debt [or otherwise state the fraudulent misrepresentations, etc.].

II. That the said representations were false.

III. That the defendant received no consideration for the said note.

NOTE.—This form is from the Code Commissioners' Book, of New York.

68. Actual Fraud must be Shown.—To set aside for fraud a decree signed and enrolled, actual, positive fraud must be shown. Mere constructive fraud is not sufficient, at all events after long delay: *Patch v. Ward*, Law Rep. 3 Ch. 203.

69. Fraudulent Misrepresentations.—An answer seeking to avoid a contract, by reason of fraudulent misrepresentations of the plaintiff in procuring it, must state in what the misrepresentations consisted, and they must be of matter of fact of which defendant was ignorant, and not of law: *People v. Supervisors of San Francisco*, 27 Cal. 656; *Holdredge v. Webb*, 64 Barb. 9. False representations in respect to the profitable nature of a business carried on upon leased premises, whereby defendant was induced to guarantee the rent, may be set up as a defense to an action on his guaranty: *Mendelson v. Stone*, 37 N. Y. Supr. (5 J. & Sp.) 408. For other cases involving fraud and illegality, see 4 Hun, 292; 13 Abb. Pr. N. S. 276; 43 How. Pr. 176; 39 N. Y. Supr. (7 J. & Sp.) 519; *Leszinsky v. White*, 45 Cal. 278; see, also, Cal. Civ. Code, sec. 1571 *et seq.*

70. How Alleged.—The answer was held fatally defective, in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity: *Kinney v. Osborne*, 14 Cal. 112. Where an answer contains a general allegation of fraud, and plaintiffs go to trial upon the issue thus joined, without taking any exception to the answer on the ground of sufficiency, and there is no objection made by the plaintiffs to the testimony introduced by defendants in support of the issue of fraud, an objection to the answer, on the ground that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by the supreme court on appeal: *King v. Davis*, 34 Cal. 100.

71. Must be Specially Pleaded.—Fraud must be specially pleaded, and the circumstances constituting fraud must be set up: *People v. Supervisors of San Francisco*, 27 Cal. 656; *Gifford v. Carville*, 29 Id. 589; *Lamott v. Butler*, 18 Id. 32.

72. Sufficient Averment.—An answer alleging that a judgment relied on by the plaintiff was obtained by fraud and collusion between parties named is sufficiently definite and certain, without specifying the acts which show fraud and collusion: *Culver v. Hollister*, 17 Abb. Pr. 405. An answer presents a good defense to an action which is brought on the ground of fraud, if it states circumstances from which it can be reasonably inferred that the fraud charged could not have been practiced: *Burk v. Stewig*, 21 Tex. 418.

No. 591.

Infancy of Plaintiff.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff is not of the age of twenty-one years [if a female, eighteen years]; or, that at the commencement of this action the plaintiff was not of the age of [twenty-one] years, and has no guardian appointed herein.

73. Account.—The defendant, being of age, signed the following statement at the foot of an account of the items and prices of goods furnished to

him, while an infant, by the plaintiff: "Particulars of account to the end of 1867, amounting to £162 11s. 6d. I certify to be correct and satisfactory:" *Held*, that this was not such a ratification in writing of the contract, within 9 Geo. IV. 14, sec. 5, as to render him liable: *Rowe v. Hopwood*, Law Rep. 4 Q. B. 1.

74. Majority of Females.—In California, females are deemed of full and legal age when they are eighteen years old: Cal. Civ. Code, secs. 25 and 27.

75. Must be Specially Pleaded.—That infancy must be specially pleaded, see *Young v. Bell*, 1 Cranch C. Ct. 342.

No. 592.

Infancy of Defendant.

[TITLE.]

The defendant answers to the complaint:

That at the time of making the supposed agreement [or of the delivery of the goods] mentioned therein, he was under the age of [twenty-one] years, to wit, of the age of years, and said agreement did not relate to personal property in the immediate possession and control of this defendant, nor for things necessary for his support.

76. Note.—In all this class of actions, where the disability of defendant is claimed, such as infancy, lunacy, etc., etc., the facts causing such disability should be in all cases specially pleaded; for, in general, such disability cannot be proven unless pleaded: See *Young v. Bell*, 1 Cranch C. Ct. 342. As to disabilities of minors, their rights, the disaffirmance of contracts by them, their contracts for necessities, and obligations entered into under the express authority of a statute, see Cal. Civ. Code, secs. 33 to 37, and *Id.* sec. 264 *et seq.*

No. 593.

Marriage of Plaintiff.

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff was, at the commencement of this action, and still is the wife of one A. B., who is still living at..... with this plaintiff.

II. That this action does not concern her separate property, or her right or claim to a homestead.

77. Disability must Appear.—Where the disability of the plaintiff, who is a married woman, does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense to the action, should set it up in his answer. Such objection is waived by a general denial: *Dillaye v. Parks*, 31 Barb. 132; see Cal. Code C. P., sec. 370.

78. Divorce.—An action brought in the names of husband and wife, to recover wife's separate estate, does not abate in consequence of divorce and subsequent marriage of wife with another: *Calderwood v. Peyser*, 31 Cal. 333.

79. Name of Wife Surplusage.—Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife was mere surplusage, and not a defect of parties under the code, and might have been stricken out on notice, if insisted upon: *Warner and Wife v. Steamship Uncle Sam*, 9 Cal. 697.

No. 594.

Marriage of Defendant.

[TITLE.]

The defendant answers to the complaint:

That at the time of making the agreement [or of the delivery of the goods mentioned therein] she was the wife of J. K.

80. Marriage.—The marriage of a female defendant does not abate an action: *Campbell v. Bowne*, 5 Paige, 34. But the marriage of a female complainant abates the suit, and it must be revived either in favor of or against her husband: *Quackenbush v. Leonard*, 10 Paige, 131; but see note 35, *ante*.

No. 595.

Marriage of Defendant after the Contract and before the Action.

[TITLE.]

The defendant answers to the complaint:

I. That she was, at the commencement of this action, and still is the wife of A. B., who now resides at..... with this defendant.

II. That this action does not concern her separate property, or her right or claim to the homestead property.

81. Arbitration and Award.—The plea of coverture, and that the defendant's husband did not consent to the arbitration upon the award in which a judgment was founded, is not sufficient in proceeding by *scire facias* to revive the judgment. Though this plea might be a good defense to an action on the judgment, yet, until such judgment is set aside, the defendant cannot resist the *scire facias*, the object of which is to enforce process upon such judgment: *Taylor v. Harris*, 21 Texas, 438.

82. Charging Separate Estate.—In an action brought to charge the separate estate of a married woman, when the coverture is alleged in the complaint, a defense that the defendant is a married woman is bad on demurrer, for it sets up no new matter: *Aitken v. Clark*, 16 Abb. Pr. 328. And such an answer is insufficient: *Id.*

83. Homestead.—A married woman may answer separately, where homestead or her separate estate is involved: *Moss v. Warner*, 10 Cal. 296; *Harlay v. Ritter*, 18 How. Pr. 147; *Phillips v. Burr*, 4 Duer, 113; see, also, Cal. Code C. P., secs. 370, 371.

84. Impotence.—Impotence does not render a marriage void, but only voidable, and the validity of a marriage cannot be impeached on that ground after the death of one of the parties. Therefore the right of a husband to administer his wife's estate cannot be disputed on the ground of the nullity of the marriage, by reason of his impotence: *A. v. B.*, Law Rep. 1 P. & D. 559.

85. Promissory Note.—An answer upon a promissory note that the maker is a married woman, is sufficient as a confession and avoidance: *Scudder v. Gori*, 18 Abb. Pr. 223.

No. 596.

Misjoinder of Parties.

[TITLE.]

The defendant answers to the complaint:

I. That A. B. is improperly joined as a plaintiff [or defendant] in this; that he has no interest in the subject-matter in controversy [or otherwise state reasons].

86. Misjoinder of Parties.—Where a misjoinder of parties plaintiff does not appear upon the face of the complaint, and the objection is not taken by answer, it is deemed waived: *Hastings v. Stark*, 36 Cal. 122; *Trenor v. C. P. R. R. Co.*, 50 Id. 223. As to non-joinder of parties plaintiff in partition, see *Sutter v. San Francisco*, 36 Cal. 112. Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supplemental answer, or it is waived: *Calderwood v. Peyser*, 31 Cal. 333; *Barstow v. Newman*, 34 Cal. 90. As to joinder of plaintiffs, see Code C. P., secs. 378 to 384; *Frost v. Harford*, 40 Cal. 165; *Powell v. Powell*, 48 Id. 234; *Andrews v. Pratt*, 44 Id. 319. As to non-joinder, see 3 Cal. 271, 467; 8 Id. 516; 12 Id. 126; 30 Id. 96; 23 Id. 245; 30 Id. 586; 38 Id. 24; 40 Id. 159; 44 Id. 396.

87. Objection must be Taken.—Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them: *Warner v. Wilson*, 4 Cal. 310; *Dunn v. Tozer*, 10 Cal. 170. The objection that there is a misjoinder of defendants must be raised by demurrer or answer; and if not so raised, the plaintiff will be entitled to recovery against all the defendants: *Story v. Livingston*, 13 Pet. 359; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Gilman v. Rives*, 10 Id. 298; *Chandler v. Byrd*, Hempst. U. S. 222; *Fosgate v. The Herkimer Manf. and Hydraulic Co.*, 2 Kern. 580; compare *Bates v. James*, 3 Duer, 45.

No. 597.

Misnomer.

[TITLE.]

The defendant answers to the complaint:

I. That the true name of the plaintiff [or of defendant] is and ever has been, and not, in which name he sues [or is sued].

88. Must be Plead.—Misnomer of plaintiff or defendant must be pleaded in abatement: *Welsh v. Kirkpatrick*, 30 Cal. 204; *King v. Randlett*,

33 Id. 321; *Mann v. Carley*, 4 Cow. 148; *Collman v. Collins*, 2 Hall, 569; *Miller v. Stettiner*, 7 Bosw. 692. And this is so even in case of a corporation: *Bank of Utica v. Smalley*, 2 Cow. 770; *Methodist Episcopal Church v. Tryon*, 1 Den. 451. In suits or proceedings by or against any corporation, a mistake in the name is waived if not pleaded in abatement. Misnomer of the plaintiff cannot be taken advantage of on the trial or by plea in bar, but must be pleaded in abatement: *Hanly v. Blanton*, 1 Mo. 49; *Boisse v. Langham*, Id. 572; *Thompson v. Elliott*, 5 Id. 118. Where two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name: Cal. Code C. P., sec. 388. As to effect of judgment in such cases, see Id.; *Mulliken v. Hull*, 5 Cal. 246.

89. Note.—It is a familiar rule that a person may be sued by a fictitious name, but a personal judgment against a fictitious person or against a person not the party to the suit would, of course, be worthless, assuming that such judgment could be obtained. This relates to defendant. A plaintiff ought to know his own name: See Cal. Code C. P., sec. 474.

No. 598.

Mistake.

[TITLE.]

The defendant answers to the complaint:

I. That when he signed the note therein mentioned, he supposed it to be for [one thousand] dollars, but by mistake it was drawn for [ten thousand] dollars.

II. That he received no consideration for more than [one thousand] dollars.

90. Mistake.—See Cal. Civ. Code, secs. 1576 to 1579.

No. 599.

Non-Joinder of a Necessary Party Plaintiff.

[TITLE.]

The defendant answers to the complaint:

I. That the goods, wares and merchandises described in the complaint were sold by plaintiff and one C. D. as partners, under the name of A. B. & C. D.

II. That the said C. D. is still living.

91. Non-Joinder.—A failure to join may be pleaded in abatement: *Whitney v. Stark*, 8 Cal. 514. An objection for a defect of parties, *e. g.*, the non-joinder of a copartner as plaintiff, which is not apparent upon the face of the complaint, must be taken by demurrer or answer: Cal. Code C. P., secs. 430, 433; Code of Pro. of N. Y. Ed. 1877, secs. 488 and 498. And if not thus interposed, the defendant must be held to have waived the objection: Cal. Code C. P., sec. 434; N. Y. Code, sec. 499; *Trenor v. C. P. R. R. Co.*, 50 Cal. 223; *Conklin v. Barton*, 43 Barb. 435. And an answer upon the merits waives all such defects: *Gillman v. Sigman*, 29 Cal. 637; *Wendt v. Ross*, 33

Id. 650; *Scranton v. Farmers' and Mechanics' Bank*, 33 Barb. 527; *Merritt v. Walsh*, 32 N. Y. 685. As to non-joinder of parties plaintiff, see generally, *McGilvery v. Moorehead*, 3 Cal. 271; *Mayo v. Stansbury*, Id. 467; *Connor v. Hutchinson*, 12 Id. 126; *Barber v. Cazallis*, 30 Id. 96.

No. 600.

Non-Joinder of Owners in Actions Between Tenants in Common.

[TITLE.]

The defendant answers to the complaint:

That and, residing at, are tenants in common with the plaintiff in said lands, and necessary parties to this action.

92. Tenants in Common.—In California, all persons holding as tenants in common, joint-tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party: Cal. Code C. P., sec. 384; see, also, Id. sec. 381.

No. 601.

Non-Joinder of a Co-Administrator.

[TITLE.]

The defendant answers to the complaint:

I. That after the death of said A. B., and on or about the day of, 187., letters of administration were duly issued to one C. D., together with the plaintiff, by the Probate Court of the County of, and said C. D. thereupon duly qualified as administrator, and as such entered upon the duties of his trust, and still is such administrator.

93. A Special Plea.—In an action on a joint contract, the omission to sue all the joint contractors may be specially pleaded: *Sweet v. Tuttle*, 4 Kern. 465. The same in an action against an attorney, one of a partnership composed of several attorneys: *Wooster v. Chamberlin*, 28 Barb. 602.

94. Names must be Given.—The plea must give the names truly, so that the plaintiff may proceed correctly the second time. If it appear on the trial that another not named by the plea was also a joint contractor, the proof fails: *Mechanics' and Farmers' Bank v. Dakin*, 24 Wend. 411; *Hawks v. Munger*, 2 Hill, 200. This rule is not changed by the code: *Fowler v. Kennedy*, 2 Abb. Pr. 347.

95. Objection must be Taken.—The fact that other persons, jointly responsible, have not been made defendants, must be pleaded in abatement, or it cannot be taken advantage of on the trial. The rule applies to all joint contracts, as well as to those arising particularly from mercantile partnerships: *Ziele v. Cambell*, 2 Johns. Cas. 382; *Williams v. Allen*, 7 Cow. 316; *Robertson v. Smith*, 18 Johns. 459; *Le Page v. McCrea*, 1 Wend. 164.

96. Setting Aside Conveyance.—In a bill to set aside a conveyance,

as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill: *Gaylords v. Kelshaw*, 1 Wall. U. S. 81.

97. Still Living.—The answer should allege that they are still living, see *Burgess v. Abbott*, 6 Hill, 135; affirming S. C., 1 Id. 476. Or, if a corporation, that it is still in existence: *State of Indiana v. Woram*, 6 Id. 33. But the omission to allege this is cured by proof on the trial that they were still living. Objection to such proof after it has been introduced should be disregarded, or the answer amended to conform to the proof: *Wooster v. Chamberlin*, 28 Barb. 602. It sufficiently alleges that they are still living, if it alleges that they reside at a place named: *Taylor v. Richards*, 9 Bosw. 679.

98. Surplusage.—After showing the facts which make it appear that other parties are necessary, and naming the parties, it is unnecessary to add a formal allegation that they are necessary parties: *Cook v. Mancius*, 3 Johns. Ch. 427.

No. 602.

Non-joinder of One Who was a Party to the Contract.

[TITLE.]

The defendant answers to the complaint:

I. That the supposed contract [or other cause of action] mentioned in the complaint was made with said....., plaintiff [or defendant], and one A. B., jointly.

II. That the said A. B. is still living.

No. 603.

i. *Payment.*

[TITLE.]

The defendant answers to the complaint:

That on the.....day of, 187., at....., he paid to the plaintiff the money demanded in the complaint [or.....dollars, on account of the demand in the complaint].

99. Application of Payments.—See Cal. Civ. Code, sec. 1479.

100. Effect of Plea.—By the pleas of payment and payment with leave, the defendant does not put in issue his original legal liability. Under such pleadings he can only show that he has paid the debt, or that he has an equitable defense to the action: *Loose v. Loose*, 36 Penn. 538.

101. Excuse for Non-payment.—What amounts to an allegation in pleading, of impossibility to excuse non-payment: *O'Reilly v. Mutual Life Ins. Co.*, 2 Abb. Pr. R. (N. S.) 167.

102. Evidence of Payment.—Under a simple allegation of payment, evidence of any facts which amount to actual payment by the person alleged to have made it, is admissible: *Farmers' and Citizens' Bank of Long Island v. Sherman*, 6 Bosw. 181; 33 N. Y. 69.

103. How Alleged.—Where payment has been made to the sheriff,

under an execution against the plaintiff, in accordance with statute, the particulars should be stated: *Calkins v. Packer*, 21 Barb. 282. An answer setting up payment after suit brought is good, although it demand that the complaint be dismissed, and judgment granted for costs. Under the code, no formal conclusion is required, and no judgment or relief is required to be prayed for, except when the defendant asks affirmative relief against the plaintiff: *Bendit v. Annesley*, 42 Barb. 192; S. C., 27 How. Pr. 184. For another form of plea, see Chitty's Forms, 109.

104. Interest.—Alleging that the defendant paid the plaintiff the several, etc., pursuing the terms of the complaint, imports payment of interest as well as the principal, and it is therefore unnecessary to aver its receipt in full satisfaction: *Chew v. Wooley*, 7 Johns. 399.

105. Must be Specially Pled.—Payment or part payment, *McKyring v. Bull*, 16 N. Y. 297, may be set up in the answer as new matter, and must be specially pleaded: *Fort v. Gooding*, 9 Barb. 371; *Texier v. Gouin*, 5 Duer, 389; *Morrill v. Irving Fire Ins. Co.*, 33 N. Y. 429; *Field v. Mayor of New York*, 2 Seld. 189; *Henderson v. Henderson*, 3 Den. 314; *Fellers v. Lee*, 2 Barb. 489; *Morey v. Farmers' Loan and Trust Co.*, 18 Barb. 406; *Pattison v. Taylor*, 1 Code R. (N. S.) 174; *Martin v. Gage*, 5 Seld. 398; *New York Life Ins. and Trust Co. v. Covert*, 29 Barb. 436. In California, payment may be proven by the defendant under a general denial, upon the ground that such denial makes it incumbent on the plaintiff to prove a subsisting indebtedness from the defendant to the plaintiff at the time of the commencement of the suit: *Wetmore v. San Francisco*, 44 Cal. 300, and cases there cited.

106. Nature of Plea.—In Pennsylvania, payment with leave is a general issue plea, and with notice of special matter, admits anything which proves fraud, mistake, want or failure of consideration, and shows that, *ex equo et bono*, a part or whole of the amount claimed should not be recovered: *Uhler v. Sanderson*, 38 Penn. 128. A plea of payment admits all the allegations in the complaint essential to support the action: *Archer v. Morehouse*, Hempst. 184. And throws the affirmative of the issue on the defendant: *Gebhart v. Francis*, 32 Penn. 78; *North Penn. R. R. Co. v. Adams*, 54 Penn. 94.

107. Payment—How Pled.—In pleading payment, it is not necessary that the answer should describe the particulars of the transaction relied on as constituting payment. Under the averment that the demand has been paid, it is competent to prove how it has been paid, whether in cash or otherwise: *Farmers' and Citizens' Bank v. Sherman*, 33 N. Y. 69, *Boyd v. Weeks*, 2 Den. 322. But where payment made to wife of plaintiff was pleaded, without alleging her authority to receive it: *Held*, bad on demurrer: *Offley v. Clay*, 2 Man. & G. 172; 2 Scott (N. R.) 372. So, where payment was made by check: See *Strong v. Stevens*, 4 Duer, 668; *Bradford v. Fox*, 16 Abb. Pr. 51; or by negotiable note: *Hoogland v. Wight*, 7 Bosw. 394; *Geller v. Seixas*, 4 Abb. Pr. 103: *Held*, that in such case it must be averred that such note was taken in payment: See also, *Homas v. McConnell*, 3 McLean, 381. So, also, a surety for rent may set up payment made by tenant for repairs agreed to be done by the landlord, by way of reduction for the claim of rent: *Rosenbaum v. Gunter*, 3 E. D. Smith, 203. And, under the plea of payment, a surety may show that the plaintiff has taken a draft of the principal debtor, payable at a future day in payment of the debt: *Albany Ins. Co. v. Devendorf*, 43 Barb. 444. It would be bad pleading to allege evidence of the payment, instead

of averring the fact itself: *Farmers' and Citizens' Bank v. Sherman*, 33 N. Y. 69. Payment of a debt by a stranger cannot be pleaded in bar of the defendant's own obligation: *Blum v. Hartman*, 3 Daly (N. Y.) 47. Part performance of an obligation, either before or after a breach thereof, where expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing, for that purpose, though without any new consideration, extinguishes the obligation: Cal. Civil Code, sec. 1524.

108. Payment by Remittance.—For an answer by a defendant sued as factor under *del credere* commission, showing a remittance by instruction of his principal, see *Heubach v. Rother*, 2 Duer, 227.

109. Payment to Sheriff.—Payment to the sheriff on an execution against the creditor must be specially pleaded: *Calkins v. Packer*, 21 Barb. 275. For the necessary proof in such case, see *Handly v. Green*, 15 Id. 601. And wherever the plaintiff could be surprised by a general allegation of payment, it will be better to plead the facts specially, as in the following forms.

110. Presumption of Payment.—An answer alleging payment is the proper form in which to set up the defense of a presumption of payment arising from lapse of time, under New York statute: *Henderson v. Henderson*, 3 Den. 314; *Pattison v. Taylor*, 8 Barb. 250; *N. Y. Life Ins. Co. v. Covert*, 29 Id. 435.

111. Receipt.—A receipt in full, given by the plaintiff after suit is brought, is a good defense by way of plea: *Wade v. Emerson*, 17 Mo. 267; *Wade v. Goldsberry*, Id. 270.

112. Time of Payment.—That the time of payment has been extended must be specially pleaded: *Allen v. Bruesing*, 32 Ill. 505; *Newell v. Salmon*, 22 Barb. 647; see, also, *Goddard v. Fulton*, 21 Cal. 430.

113. Time Alleged.—It is not essential to designate the time of payment, though it ought to appear to have been before suit: *Bird v. Caritat*, 2 Johns. 342.

No. 604.

ii. *Payment by Note.*

[TITLE.]

The defendant answers to the complaint:

That on the day of, 187., at, at the request of the plaintiff, he made his promissory note to one C. D. for dollars, in discharge of the indebtedness stated in the complaint.

114. Payment by Note.—Under an answer averring payment by note, evidence of payment in money or by check is inadmissible: *Canfield v. Miller*, 13 Gray (Mass.) 274. This rule is only to be applied to avoid surprise or prejudice to the defendant: *Farmers' and Citizens' Bank v. Sherman*, 6 Bosw. 181.

No. 605.

iii. *Payment by Bill Accepted in Discharge, which Plaintiff has Lost.*

[TITLE.]

The defendant answers to the complaint:

I. That before this action the plaintiff drew his bill on

the defendant for the amount of said account [or other indebtedness alleged], dated on the . . . day of . . . , 187 . , and payable to the order of the plaintiff . . . months after said date; which the defendant then accepted.

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards, and before the same became due and payable, lost the same, and cannot produce it to the defendant.

115. Acceptance of Negotiable Paper.—The acceptance of a negotiable promise of payment from a debtor suspends the remedy upon the original indebtedness, but acceptance of a non-negotiable promise does not, unless it is founded upon a new consideration: *Geller v. Seixas*, 4 Abb. Pr. 103; *Ranken v. Deforest*, 18 Barb. 144.

116. Payment by Check.—An answer which states that defendant gave his check for the sum lent, and interest to the time it was given, and that the plaintiffs have not returned it, and that it is still outstanding, is insufficient, unless it also avers that plaintiffs have negotiated it to a third person, who holds or owns it: *Strong v. Stevens*, 4 Duer, 668; compare *Geller v. Seixas*, 4 Abb. Pr. 103; *Crowe v. Clay*, 25 Eng. L. and Eq. 451; *Thayer v. King*, 15 Ohio, 242.

No. 606.

iv. *Payment in Services.*

[TITLE.]

The defendant answers to the complaint:

I. That after the said promissory note became payable, and before this action, to wit: on the . . . day of . . . , 187 . , the plaintiff agreed to receive and the defendant agreed to render to the said plaintiff his services as [teamster] to the amount of said note.

II. That defendant afterwards, according to the said agreement, rendered such services to the plaintiff, to the full amount due and payable on the said note.

117. Form.—This form is sustained by *Louden v. Birt*, 4 Ind. 566.

No. 607.

Release.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 187 . , at . . . , the plaintiff, by deed, released the defendant from the claim set up in the complaint.

118. Covenant as a Release.—To avoid circuitry of action, a covenant may be pleaded as a release, but it must be a covenant between the parties to the original obligation, and must contain words that will give the covenantee

a right of action, which will precisely countervail that to which he is liable: *Garnett v. Macon*, 2 Brock. Marsh. 185; S. C., 6 Call, 308.

119. Effect of Release.—A release by one of several joint plaintiffs is a bar to the action: *Austin v. Hall*, 13 Johns. 286; and see *Mott v. Burnett*, 2 E. D. Smith, 50. A sealed release to one of several joint obligors inures to the benefit of all: *Rowley v. Stoddard*, 7 Johns. 207. Otherwise of a covenant not to sue: *Tuckerman v. Newhall*, 17 Mass. 583; see, also, *Harrison v. Close*, 2 Id. 448. In California, a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right of contribution from him: Civ. Code, sec. 1543; as to release generally, see Id., secs. 1541, 1542.

120. Equitable Discharge.—An equitable discharge from judgment does not support a plea of payment, but should be specially pleaded as a release, and a defendant, being surety, having thus incorrectly pleaded, was allowed to amend, on the condition that he should recover no costs of action: *Shelton v. Hurd*, 7 Rhode Island, 403.

121. Form of Release.—A release under seal of one of several joint or joint and several debtors or obligors, is a release to all: *Armstrong v. Hayward*, 6 Cal. 185; *Rowley v. Stoddard*, 7 Johns. 207; *American Bk. v. Doolittle*, 14 Pick. 126; *Tuckerman v. Newhall*, 17 Mass. 583; *Goodenow v. Smith*, 18 Pick. 415. And that a release extinguishes the obligation: *McCrea v. Parmort*, 16 Wend. 474; cited in *Prince v. Lynch*, 38 Cal. 528.

122. Release.—If any matter of defense has arisen after an issue in fact, it may be pleaded by the defendants; as that the plaintiff has given him a release, or in an action by an administrator, that the plaintiff's letters of administration have been revoked: *Yeaton v. Lynn*, 5 Pet. 223. A release by the plaintiff must be specially pleaded: 1 Van Santv. 403; *Turner v. Caruthers*, 17 Cal. 431; *Coles v. Soulsby*, 21 Id. 50.

123. Release after Issue Joined.—A release given after issue is joined in an action can properly only be the subject of a supplemental answer, and not of an amendment to that originally put in: *Matthews v. Chicopee Manuf. Co.*, 3 Robertson, 711.

124. Release Implied.—The law implies the release and discharge of a right of action, where the creditor voluntarily delivers to his debtor the bond, note or other evidence of his claim: Poth. Obl. n. 608, 609; Bouv. Law Dic., Title Release; 29 Penn. Rep. 50; *Beach v. Endress*, 51 Barb. 570. "The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act:" Cal. Civ. Code, sec. 1699. "The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act:" Id. sec. 1700. "Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section:" Id. sec. 1701. As to release by novation, see Id. secs. 1530 to 1533.

125. Release of Property.—Release of property from levy on execution discharges third parties who are liable collaterally, or as sureties therefor: *Mulford v. Estudillo*, 23 Cal. 94.

*No. 608.*i. *Statute of Frauds.*

[TITLE.]

The defendant answers to the complaint:

I. That no note or memorandum in writing, expressing the consideration, was ever made of any such contract, as is alleged in the complaint, or of any contract whatever [or state other facts as they exist].

II. That he did not receive any part of the goods, wares, or merchandise mentioned in the complaint.

III. That he did not pay any part of the purchase-money.

126. Essential Averments.—A plea of the statute of frauds should expressly aver that the contract concerning the lands sought to be enforced was not in writing: *Bean v. Valle*, 2 Mo. 126. In an action on a contract not in writing, but which to be binding on defendant should be in writing, under general denial the existence of the contract is in issue: *Livingston v. Smith*, 14 How. Pr. 492; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Champlin v. Parish*, 11 Paige, 408; *Haight v. Child*, 34 Barb. 191. Or defendant may deny that the contract is in writing or that it is subscribed: *Id.*; *Cozine v. Graham*, 2 Paige. 181; *Ontario Bank v. Root*, 3 Id. 478; *Harris v. Knickerbocker*, 5 Wend. 638.

127. How Pleded.—The rule under the former practice, that when the terms of a contract are in dispute, and the answer does not deny the contract, the terms of it cannot be proved by parol, is altered by the New York code, and now an answer is sufficient which admits the making of a contract and sets out its terms, although it omits to set up the statute of frauds as a bar: *Haight v. Child*, 34 Barb. 186. The title being no part of an act, it need not be recited: *Eckert v. Head*, 1 Mo. 593.

128. Lease.—That neither the defendant, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing, for making or executing any lease to the said plaintiff, of the same premises, or any of them, or of any part thereof, or to any such effect as is alleged; or any memorandum or note in writing of any agreement whatsoever, for or concerning the demising or leasing, or making or executing any lease of the said premises, or any of them or any part thereof, to the plaintiff: Eq. Draftsman, 654.

129. Must be Specially Pleded.—A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded: *Osborne v. Endicott*, 6 Cal. 149; *Maynard v. Johnson*, 2 Nev. 16. Where contract is void *ab initio*, a general plea of *non est factum* is proper. Where it is merely voidable, a special plea setting forth the special circumstances is necessary: 2 Stra. 1104; Bull. N. P. 172; 16 Mass. 348; 14 Pick. 303; *Bottomley v. United States*, 1 Story C. Ct. 135; *Marine Ins. Co. v. Hodgson*, 6 Cranch U. S. 206; *Greathouse v. Dunlap*, 3 McLean U. S. 303.

130. Note.—There are other agreements which by our statute must be in writing, to wit, for the sale of lands, etc., references to which appear under their appropriate headings.

131. Statute of Frauds.—As to what contracts are required to be in writing, see Cal. Civ. Code; secs. 1624, 1739, 1741, and 2794. For cases held to be within the statute, see 38 Cal. 99; 43 Id. 509; 46 Id. 266; 47 Id. 378; 48 Id. 208; Id. 405; 50 Id. 23. For cases held not to be within the statute, see 37 Cal. 529; 45 Id. 78; 46 Id. 7; 39 Id. 109; 44 Id. 591; 37 Id. 634; 47 Id. 138; 49 Id. 49.

No. 609.

ii. Statute of Frauds—Another Form.

[TITLE.]

The defendant answers to the complaint:

That plaintiff ought not to have his said action; because neither defendant, nor any person by him legally authorized, did ever make or sign any contract or agreement in writing, binding this defendant to make any such conveyance of the said premises to the plaintiff as he has in said complaint demanded.

132. Agreement not to be Performed within a Year.—That although the said agreement by its terms was not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof was or is in writing and subscribed by the said....., who is sought to be charged therewith, or by his lawful agent, or by any other person.

No. 610.

iii. Statute of Frauds—Another Form.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. Etc.

II. Defendant, for a further defense, alleges that the promise set forth in the complaint was a special promise to answer for the debt, default, or miscarriage of A. B. [or as the case may be], in the complaint named.

III. That no note or memorandum of said promise or agreement was made in writing, and signed by defendant or any other person by his authority, or at all.

No. 611.

iv. Statute of Frauds—Agreement in Consideration of Marriage.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said alleged agreement was made upon consideration of marriage, and that neither said agreement nor any note or memorandum thereof was ever in writing, and subscribed by said....., who is sought to be charged therewith, or by his lawful agent, or at all.

*No. 612.*v. *Statute of Frauds—Ultra Vires Corporation.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff was not and is not authorized by law to take, hold, and convey real property, except for the following purposes, and in the following manner [here set forth the power of the corporation].

II. That the deed alleged in the complaint was executed and accepted on the part of said corporation, for the purpose of [here state purpose not within the power].

133. Corporation.—Assuming that the corporation under some circumstances was authorized to take and transfer real estate by deed, it rests with the defendant to show by allegation and proof that the plaintiff did not take or transfer the title to the premises in question for any purpose, and in the form authorized by law: *Farmers' Loan and Trust Co. v. Curtis*, 7 N. Y. 466.

134. When Acts are Ultra Vires.—The term *ultra vires*, when used in reference to corporations, is employed in different senses. An act is said to be *ultra vires* when it is not in the power of the corporation to perform it under any circumstances; and an act is also said to be *ultra vires* with reference to the rights of certain parties, when the corporation cannot perform it without their consent; and it may also be *ultra vires* with reference to some specific purpose, when the corporation cannot perform it for that purpose: *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543. When the act is *ultra vires* in the sense first mentioned, it is void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second and third senses, the right of the corporation to avail itself of the plea will depend on the circumstances of the case: *Id.* It devolves upon the party contesting the validity of such act to overcome the presumption that it was regularly done, and for a rightful purpose: *Id.* Corporations for the construction of turnpike roads can hold only such real estate as the purposes of the corporation may require: *Coleman v. S. T. R. Co.*, 49 Id. 518; see, also, *Vandall v. S. S. F. Dock Co.*, 40 Id. 83.

*No. 613.*i. *Statute of Limitations.*

[TITLE.]

The defendant answers to the complaint:

That the cause of action set forth therein did not accrue within years before the commencement of this action.

*No. 614.*ii. *Statute of Limitations, Cal. Code, Sec. 458.*

[TITLE.]

The defendant, answering the complaint, alleges:

That the cause of action stated in the complaint of the plaintiff herein is barred by the provisions of the first sub-

division of section three hundred and thirty-nine of the Code of Civil Procedure of this State [insert whatever section and subdivision may be applicable to the cause of action].

135. Action.—The term “action” as used in the Cal. Code C. P., in reference to the limitation of actions, includes a special proceeding of a civil nature: Sec. 363. For the limitation of actions for the recovery of real property, see Cal. Code C. P., sec. 315–323. For the limitation of actions other than for the recovery of real property, see Id., secs. 335 to 363. Actions for relief in respect to which no other limitation is provided, must be brought within four years after the cause of action shall have accrued: Id., sec. 343. To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation: Id., sec. 348.

136. Application of Statute.—In California, the statute of limitations applies equally to actions at law and to suits in equity. It is directed to the subject-matter, and not to the form of the action, nor to the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties: *Lord v. Morris*, 18 Cal. 482; *Boyd v. Blankman*, 29 Id. 20.

137. Construction of Answer.—An answer stating that the cause of action has not accrued within five years is sufficient for five years, and for any period of limitation named in the statute less than five years: *Boyd v. Blankman*, 29 Cal. 20. The words “preceding the commencement of this action,” in such answer, are equivalent to the words preceding the filing of this complaint: *Adams v. Patterson*, 35 Cal. 122. The defense must point to the time of filing the original complaint, and not an amended one: *Lorenzana v. Camarillo*, 45 Id. 128.

138. Construction of Statute.—Statutes of limitation do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage: *Nelson v. Nelson*, 6 Cal. 430. The statute runs not from the time of the promise, but from the time of the breach: *Stilwell v. Hasbrouck*, 1 Hill, 561; *United States v. White*, 2 Id. 59; *Tracy v. Rathbun*, 3 Barb. 543. The mere statement in the complaint that the claim was due at a certain time does not conclude the plaintiff under the statute of limitations, if it appears from the facts stated that the right of action did not accrue till a later date: *Walden v. Craft*, 2 Abb. Pr. 301.

139. Defense under the Statute.—It is not necessary that the defense of the statute of limitations should be accompanied by a denial of the allegations of the complaint intended to avoid or head off that defense, to prevent the court taking them as true: *Sands v. St. John*, 36 Barb. 628.

140. Effect of Statute.—The statute of limitations does not have the effect to extinguish a debt, nor raise a presumption of its payment; it only bars the remedy, and thus becomes a statute of repose: *McCormick v. Brown*, 36 Cal. 180. The rule held in this case, as to what constitutes a sufficient acknowledgment of a debt, to take it out of the statute, affirmed in *Farrell v. Palmer*, Id. 187.

141. Exceptions under the Statute.—The defendant is not bound to negative the exceptions from the general rule that the statute establishes. It lies upon the plaintiff to aver and prove the facts that create the exception: *Ford v. Babcock*, 2 Sandf. 518; *Huntington v. Brinckerhoff*, 10 Wend. 278. And if so averred, a pure plea of the statute is no bar, unless accompanied with an answer destroying the force of those circumstances, by issuable averments: Beames' Pl. 169; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Goodrich v. Pendleton*, 3 Id. 384; Story's Eq. Pl. 672, sec. 754. But it has been held, also, that such allegations are immaterial, and need not be answered: *Sands v. St. Johns*, 36 Barb. 628; S. C., 23 How. Pr. 140. But see Cal. Code C. P., sec. 458.

142. Form of Answer.—For form of answer, see Angell on Limitations, secs. 287, 309, and case there cited; see, also, *Soulden v. Van Rensselaer*, 3 Wend. 472; *Fisher v. Pond*, 2 Hill, 338; *Bell v. Yates*, 33 Barb. 627. A defendant relying on the statute of limitations should not allege matter of law, but the facts which bring him within the statute: *Boyd v. Blankman*, 29 Cal. 20. But the code has provided that "in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally, that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon), of the code of civil procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred:" Cal. Code C. P., sec. 458.

143. How Pleased.—To rely upon the presumption of payment from lapse of time, the defendant should plead, not the statute, but payment, and if he cannot swear to this, his affidavit may state the facts which raise the presumption of payment: *Giles v. Baremore*, 5 Johns. Ch. 545. The statute should not be pleaded as a bar to the whole demand, if it is a good defense to a part only: *Wood v. Riker*, 1 Paige, 616.

144. Insufficient Allegations.—An allegation of lapse of time held not to amount to a plea of the statute of limitation, in a case where leave to plead the statute had been refused: *People ex rel. Barton v. Rensselaer Ins. Co.*, 38 Barb. 323. The general allegation in answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not the correct method of pleading the statute of limitation: *Schroeder v. Jahns*, 27 Cal. 278; see, also, *McKay v. Petaluma Lodge*, Cal. Sup. Ct: April T., 1866. Where the statute of limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad: *Lyon v. Bertram*, 20 How. U. S. 150.

145. Judgment.—An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise: *McCormick v. Brown*, 36 Cal. 180.

146. Married Woman.—Since 1863, the statute runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her: *Wilson v. Wilson*, 36 Cal. 447; Code C. P., sec. 328, subd. 4.

147. Must be Specially Pleased.—The statute of limitation must be

specially pleaded: *Steamer Senorita v. Simonds*, 1 Or. 274; *Lyon v. Bertram*, 20 How. U. S. 149; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Fogal v. Pirro*, 10 Bosw. 100; 17 Abb. Pr. 113; *Sands v. St. John*, 36 Barb. 628. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in the answer: *Smith v. Richmond*, 19 Cal. 476. In New York, it seems it can only be taken by answer, and not by demurrer: N. Y. Code, Ed. 1877, sec. 413; *Lefferts v. Hollister*, 10 How. Pr. 383; 16 Id. 546; and see *Butler v. Mason*, 5 Abb. Pr. 40; *Sands v. St. John*, 36 Barb. 628. And is not favored unless in aid of justice: *Cooke v. Spears*, 2 Cal. 409. A defendant who claims the benefit of an act for the limitation of actions, which applies only to a particular class of cases, must plead it specially: *Howell v. Rogers*, 47 Cal. 293.

148. Personal Privilege.—See, as to absolute right to interpose this defense, where existent, *Sheldon v. Adams*, 41 Barb. 54; 27 How. Pr. 179; 18 Abb. Pr. 405; *Harriott v. Wells*, 9 Bosw. 631. Pleading the statute of limitations is a personal privilege, which the defendant may assert or waive at his option, but must be set up in some form, either by demurrer or answer, and if not so set up is deemed waived: *Grattan v. Wiggins*, 23 Cal. 16. The statute of limitations may be allowed to be pleaded at any time when in furtherance of justice: *Cooke v. Spear*, 2 Cal. 409. So, in case of the allowance of a several plea after a joint plea filed: *Robinson v. Smith*, 14 Id. 254. Or the court may refuse permission to set up the statute after pleading to the merits: *Stuart v. Landers*, 16 Id. 372. If the statute of limitations is pleaded, and the plea is overruled, it cannot be put in again by the same parties or their privies: *Fisher v. Rutherford*, Bald. 188. How pleaded, see *Bank of Columbia v. Ott*, 2 Cranch C. Ct. 575; *Union Bank of Georgetown v. Eliason*, Id. 667.

149. Statutes of Different States—Rule.—Where the cause of action accrued in one state, and suit was brought upon it in another state, a plea of the statute of limitations of the former state was not a good plea; but the same was demurrable, and the court sustained the demurrer: *Townsend v. Jemison*, 9 How. U. S. 407. The rule is that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the rule of *lex loci contractus* cannot prevail: Id. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued: Cal. Code C. P., sec. 361. It is an universally accepted rule that statutes of limitations are to be strictly construed. General words in the statute must receive general construction, and if there be no express exception the court can make none: *Tyman v. Walker*, 35 Cal. 634.

150. Suspension of Remedy.—If the mortgagee, after obtaining a judgment foreclosing his mortgage, by an agreement with the mortgagor enters into possession of the mortgaged property, and received the rents and profits, and applies them towards the satisfaction of the amount due, and the mortgagee further agrees not to issue an order of sale, the statute of limitations does not run against either party, so long as the debt remains unpaid, and they acquiesce in the arrangement: *Frink v. Le Roy*, 49 Cal. 315.

151. Taxes.—An action to recover back money paid, under protest, for taxes, must be brought within six months: *Cameron v. Smith*, 50 Cal. 303.

152. When Action Commenced.—Filing the complaint is the commencement of the action: Cal. Code C. P., sec. 350. The position that the filing of the complaint without the issuance of the summons, does not prevent the statute running, is not tenable: *Sharp v. Maguire*, 19 Cal. 577; *Pimental v. City of S. F.*, 21 Id. 367. But it seems the plaintiff should issue his summons within a year: See Cal. Code C. P., sec. 406; *Allen v. Marshall*, 34 Cal. 166.

153. When Cause of Action Accrues.—The clause, “after the cause of action shall have accrued,” does not imply in addition the existence of a person legally competent to enforce it by suit. It runs in all cases not expressly excepted from its operation: *Tyman v. Walker*, 35 Cal. 643.

No. 615.

i. *Tender.*

[TITLE.]

The defendant answers to the complaint:

I. That on the day of, 187., at, before the commencement of this action, he tendered to the plaintiff dollars [in gold and silver coin of the United States], in payment of the [contract, note, or indebtedness] in the complaint set forth.

II. That the defendant has always been and still is ready and willing to pay the same to the plaintiff, and now pays the same into this court [or state the facts].

154. Affirmative Pleas.—Payment, tender, and readiness to pay are affirmative pleas, and cast the burden of proof on the defendant: *North Penn. Railroad v. Adams*, 54 Penn. 94. And the plea of tender must be specially stated: *Bryan v. Maume*, 28 Cal. 238; *Duff v. Fisher*, 15 Id. 375. And that the defendant has always been and still is ready to pay the sum tendered, and the money must be brought into court: *Bryan v. Maume*, 28 Cal. 238. And it is essential in setting up a tender to aver that the money has been actually brought into court: *Hill v. Place*, 5 Abb. Pr. (N. S.) 18. As to this defense generally, see *Wilder v. Seelye*, 8 Barb. 408; *People v. Banker*, 8 How. Pr. 258; *Livingston v. Harrison*, 2 E. D. Smith, 197.

155. Effect of Plea.—Where the defendant pleads tender before suit, and pays the amount of his tender into court, and the plaintiff fails to show himself entitled to a larger sum, it is proper to render judgment for the defendant for his costs, and in favor of the plaintiff for the amount due at the time of the tender: *Curiac v. Abadie*, 25 Cal. 502; *Logue v. Gillick*, 1 E. D. Smith, 398. In such case the plaintiff shall not recover costs, but shall pay the costs of suit to the defendant: Cal. Code. C. P., sec. 1030. A tender does not extinguish or satisfy the obligation, and an offer to comply with the demand of a judgment does not amount to a satisfaction thereof: *Reddington v. Chase*, 34 Cal. 666.

156. How Made.—Actual production and offer of money to creditor,

necessary to a valid tender: *Strong v. Blake*, 46 Barb. 227. And it must be unconditional; if receipt or satisfaction piece be asked for, it vitiates it: *Roosevelt v. Bull's Head Bank*, 45 Barb. 579. But see Cal. Code C. P., sec. 2073, which provides that a receipt properly signed may be demanded as a condition of the payment or delivery. So, an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property: *Id.* sec. 2074.

157. Issue Joined.—Where the plaintiff joins issue on such a plea, without questioning its sufficiency, he cannot afterwards object that it was not duly filed, or that the money was not paid into court at the first term: *Rudolph v. Wagner*, 36 Ala. 698. If, by the laws of the United States, there is more than one kind of lawful money, a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States, is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive: *Magraw v. McGlynn*, 26 Cal. 428. The legal tender act is held constitutional: *Belloc v. Davis*, 38 Cal. 254, and cases cited. It is competent for the state legislature to enact that all tolls, dockage, and wharfage charges payable into the public treasury, shall be due and collectible exclusively in gold and silver money of the United States: *People v. Steamer America*, 34 Cal. 676.

158. Legal Tender.—The legal tender law is constitutional as to debts contracted before its passage: *Wilson v. Triplecock*, 23 Iowa, 331; *contra Riley v. Sharp*, 1 Bush, 348; see *Hall v. Hiles*, 2 Id. 532.

No. 616.

ii. *Payment as to Part, and Tender as to Residue.*

[TITLE.]

The defendant answers to the complaint:

I. [Allege payment of part.]

II. That on the day of, 187., at, he tendered to the plaintiff the residue of said claim, to wit, the amount of dollars, etc. [as in preceding form.]

No. 617.

iii. *Denial as to Part, and Tender as to Residue.*

[TITLE.]

The defendant answers to the complaint:

I. That he agreed to pay to the plaintiff dollars only [or that the goods, or services, mentioned therein were reasonably worth no more than dollars].

II. That before this action, on the day of, 187., at, he tendered to the plaintiff, in gold and silver coin of the United States, dollars, in payment of said sum. [Continue as in preceding form.]

*No. 618.*i. *Want of Capacity—Alien Enemy.*

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff was not, at the commencement of this action, and is not now a citizen of the United States, but was and is an alien, born in, out of the allegiance of the United States, and within the kingdom of

II. That at the commencement of this action the government of said was, and still is at war with, and is an enemy of the United States.

III. That the plaintiff then was and still is an alien enemy, abiding without the United States, and at, within said, and adhering to the said enemies of the United States.

159. Form.—This form is sustained by *Bell v. Chapman*, 10 Johns. 183. The disability only continues during the war: *Hamersley v. Lambert*, 2 Johns. Ch. 508.

160. Residence.—Residence within the United States presumptively defeats the plea: *Clarke v. Morey*, 10 Johns. 69.

161. Time.—Where an alien commences action in time of peace, it is competent on a declaration of war with the country of his domicile to interpose this plea. *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. U. S. 105.

*No. 619.*ii. *Want of Capacity—Assignment.*

[TITLE.]

The defendant answers to the complaint:

That before the commencement of this action, and on or about the day of, 187., at, the plaintiff duly assigned the subject-matter and cause of action set forth in the complaint to one R. S., who then was and has been ever since the holder thereof.

162. Assignee.—An answer setting up that another party than the plaintiff is the real party in interest, should allege facts which would show as a matter of law that another person should have brought the suit: *Raymond v. Pritchard*, 24 Ind. 318.

163. Assignee of Plaintiff's Interest.—It is optional with the court, on death of plaintiff, in case of a transfer of his interest, to allow assignee of plaintiff's interest to be substituted, and the action to continue in his name: *Barstow v. Newman*, 34 Cal. 90; *Sheldon v. Havens*, 7 How. Pr. 268; *Harris v. Bennett*, 1 Code R. (N. S.) 203; *Murray v. Gen. Mut. Ins. Co.*, 2 Duer, 607; *Ford v. David*, 1 Bosw. 571; *Howard v. Taylor*, 11 How. Pr. 380; *Banks v. Maher*, 2 Bosw. 690; *Terry v. Roberts*, 15 How. Pr. 65; but see *Barribeau v.*

Brant, 17 How. U. S. 43. Upon the death of an assignee for the benefit of creditors, pending an action in the nature of replevin, brought by him to recover damages from a sheriff for the tortious taking of assets, the proper parties to be substituted are the personal representatives of the deceased, since the action relates to personal property: *Emerson v. Bleakley*, 5 Abb. Pr. (N. S.) 350.

164. Facts must be Alleged.—An answer should allege the facts, showing why the plaintiff is not a real party in interest: *Russell v. Clapp*, 7 Barb. 482; *Foadick v. Groff*, 22 How. Pr. 158. But it is not necessarily frivolous: *Tamissier v. Cassard*, 17 Abb. Pr. 187. The answer is not frivolous for neglecting to name the assignee, or designating him as John Doe: *Smith v. Mead*, 14 Abb. Pr. 262; *Metropolitan Bank v. Lord*, 1 Id. 185. If it appears by the pleadings that the assignment was in trust, it should be also alleged that the assignee accepted it: *Whitlock v. Fiske*, 3 Edw. 131.

165. Insufficient Pleas.—A plea entirely addressed to the right to recover of a third person for whose use the suit is brought, is bad on demurrer: *Sydam v. Cannon*, 1 Houst. 431. So, on the ground that the title of the plaintiff is merely colorable: *Boyreau v. Campbell*, 1 McAll. 119. A plea to the jurisdiction on the ground that a demand has been colorably assigned, in order to evade a discharge under the insolvent law, is not to be treated as dilatory and captious: *Wallace v. Clark*, 3 Woodb. & M. 357.

166. Must be Specially Set up.—The objection that the plaintiff is not the real party in interest must be set up in the answer, to enable defendant to rely upon it, or it will be unavailing on the trial, even if the fact should appear from the examination of witnesses: *Jackson v. Whedon*, 1 E. D. Smith, 141; *Savage v. Corn Exchange, etc., Ins. Co.*, 4 Bosw. 1. But see *Swift v. Swift*, 46 Cal. 266. But if it appear from the face of the complaint that defendant is not the real or true party plaintiff, then the objection should be made by demurrer.

167. Set-off.—In an action by the assignee of a claim, a demand existing prior to the assignment, in favor of defendants, and against the assignor, is unavailable as a counter-claim, and if so pleaded no reply is necessary: *Dill-yea v. Niles*, 4 Abb. Pr. 253; *Ferreira v. Depew*, 4 Id. 131. To render it available as an equitable defense, it must be pleaded as a defense: *Ferreira v. Depew*, 4 Id. 131; *Wolfe v. H.*, 13 How. Pr. 84. In an action brought by an assignee of a demand, an answer interposing as a set-off a claim subsisting in favor of the defendant against the assignor, is not to be regarded as setting up a counter-claim; and the plaintiff need not put in a reply of the statute of limitations in order to avail himself of such statute against the claim so set up: *Thompson v. Sickles*, 46 Barb. 49. A demand against the plaintiff's assignor, who is not a party, is not generally available: *Cummings v. Morris*, 25 N. Y. 625; *Dillaye v. Niles*, 4 Abb. Pr. 253; *Ferreira v. Depew*, 4 Id. 131; *Spencer v. Babcock*, 22 Barb. 326. But when a creditor having a debt due him by mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor purchased by the debtor after the assignment, but before notice to him, constitutes an offset *pro tanto* to the debt in an action upon it by the assignee: *McCabe v. Grey*, 20 Cal. 509.

*No. 620.*iii. *Want of Capacity—Denial of Plaintiff's Corporation.*

[TITLE.]

The defendant answers to the complaint:

I. That there was not at the commencement of this action, nor is there now any such corporation as the Mining Company, named as plaintiff in this action.

II. That the plaintiff was not a *de facto* corporation, nor did the persons claiming to compose the said alleged corporation, at the commencement of this action, nor at any of the times mentioned in the complaint, claim in good faith to be a corporation.

NOTE.—Consult the notes and authorities in Vol. I, p. 210 *et seq.*

168. Consolidated Corporation.—Where by state statute, power is given to connecting railway corporations to merge and consolidate their stock, and such merger and consolidation has been judicially decided by the supreme court of the State to be a dissolution in law of the previous companies, and the creation of a new corporation with new liabilities; in such case, where the declaration avers that the defendant had agreed that stocks of one of the connecting railroads should be worth a certain price, at a certain time and in a certain place, and the plea sets up that under the statute the stock of the railway named was merged and consolidated by the consent of the party suing, with a second railway named, so forming “one joint stock company of the said two corporations,” under a corporate name stated, such plea is good, though it do not aver that the consolidation was done without the consent of the defendants: *Clearwater v. Meredith*, 1 Wallace U. S. 25. Such a plea contains two points only which the plaintiff can traverse, the fact of consolidation, and the fact of consent; and these must be denied separately. If denied together, the replication is double and bad: *Id.*

169. Denial of Incorporation.—The want of capacity to sue or be sued must be specially alleged: *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 585; *White v. Moses*, 11 Id. 69; *Society for Prop. of Gosp. v. Town of Pawlet*, 4 Pet. 480; *Philadelphia R. R. Co. v. Quigley*, 21 How. U. S. 202; *Dillaye v. Parks*, 31 Barb. 132. By pleading to the merits the objection is waived: *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386; *Society for Prop. of Gosp. v. Town of Pawlet*, 4 Id. 480; *Yeaton v. Lyman*, 5 Id. 223. While under the statutes of California, 1862, p. 110, Civil Code, sec. 358, the due incorporation of a corporation cannot be inquired into collaterally, yet a private person is not thereby precluded from denying that it is a corporation *de jure* or *de facto*: *Oroville and Virginia City Railroad Co. v. Plumas County*, 37 Cal. 360; *Dean v. Davis*, 51 Id. 407; *Zion M. E. C. v. Hillery*, Id. 155; *Roman C. O. A. v. Abrams*, 49 Id. 456; see *ante*, vol. I, p. 213, note 21.

170. Denial not New Matter.—Where the defendants are sued by a corporate name, though the complaint does not allege that the defendants are incorporated, still plaintiff must prove the fact if denied, and a denial that defendants are a corporation is not new matter: *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. 573. Before the revised statutes of New York, the denial of

incorporation amounted only to the general issue: *Hartford Bank v. Murrell*, 1 Wend. 87; *Welland Canal Co. v. Hathaway*, 8 Id. 480; *Wood v. Jefferson County Bank*, 9 Cow. 194. And it was equally bad when applied to foreign corporations: *Farmers' and Mechanics' Bank v. Rayner*, 2 Hall, 195. But under the revised statutes, to require a domestic corporation plaintiff to prove its corporate organization, the defendant must specially plead the non-existence of such corporation; and this plea was a good plea in bar: *Methodist Episcopal Church v. Tryon*, 1 Den. 451; see, also, *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Park Bank v. Tilton*, 15 Abb. Pr. 384. But such a denial cannot be made on information and belief: *East River Bank v. Rogers*, 7 Bosw. 493.

171. Dissolution.—An action by a corporation is not abated by dissolution, but may be continued in corporate name: *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362; *Talmage v. Pell*, 9 Paige, 410.

172. Estoppel.—As a general rule, corporations have power to waive their rights, and are bound by estoppels *in pais*, like natural persons: *Hale v. Union Ins. Co.*, 32 N. H. 295. When an association assumes a name and exercises the powers of a corporation, it is estopped from denying its corporate liabilities: *United States Express Co. v. Bedbury*, 34 Ill. 459. A corporation which has entered into contracts in its corporate capacity is estopped, when sued thereon, from denying its corporate existence: *Callender v. Painesville and Hudson River R. R. Co.*, 11 Ohio St. 516. Where defendant accepted the office of treasurer of an incorporation, and served for several years as such, he was estopped from denying its corporate existence: *Parrott v. Byers*, 40 Cal. 614; 14 Johns. 238; *All Saints' Church v. Lovett*, 1 Hall, 191. One entering into a contract with a corporation is estopped from setting up in an action upon such contract that the corporation was not legally formed: 3 Sandf. 170; 17 Barb. 378; 17 Ohio, 407; *White v. Coventry*, 29 Barb. 305; to same effect, *White v. Ross*, 15 Abb. Pr. 66; *Hyatt v. Esmond*, 37 Barb. 601; *Hyatt v. Whipple*, Id. 595; *Cooper v. Shaver*, 41 Barb. 151; but compare *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

173. General Denial.—To put the plaintiff to proof of his corporate capacity in this case, a general denial is not sufficient, but the answer must deny the existence of such a corporation: *Park Bank v. Tilton*, 15 Abb. Pr. 384; *Bank of Havana v. Wickham*, 7 Abb. Pr. 134.

174. Money Count.—Complaint charged that plaintiff had expended eight hundred dollars as treasurer of a corporation, by direction of its officers. Answers contained: First, a denial of knowledge or information that the corporation was indebted in the sum of seven hundred dollars, or any other sum. Second, and allegations that the plaintiff was instructed, by resolution of the directors, to expend the earnings of the corporation which should come into his hands, and no more; and that, with knowledge of the amount of earnings and of such resolution, he made further advances in his own name: *Held*, that the first answer did not admit but denied that the sum of eight hundred dollars was expended by direction of the corporation. The second defense is not the less a denial of the allegations of the complaint, if it be conceded that other portions of that answer introduce new matter: *Simmons v. Sisson*, 26 N. Y. 264. The first defense, it seems, is not a mere denial of a legal conclusion, but is equivalent to *nil debet*, and puts the

plaintiff to proof of his cause of action. If insufficient, it was too late to object at the close of the trial: *Id.*

175. Must be Denied.—If evidence is required on that point, it must be because that is a point in issue; and it cannot be in issue unless it is affirmed in the pleadings on one side, and denied on the other: See Ang. and Ames on Corp., 631, and cases cited; *Oroville and Virginia City Railroad Company v. Supervisors of Plumas County*, 37 Cal. 362.

176. Positive Denial.—The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons, and those applicable to artificial persons: *San Francisco Gas Co. v. The City*, 9 Cal. 453. There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but this court can make no distinction, because the code makes none. It is a matter for the legislature, and not for the court: *Id.*

177. Sufficient Denial.—Where the complaint averred a contract between plaintiff and the board of supervisors, on behalf of the county, and the answer admitted a contract between the plaintiff and another on the one side, and the county on the other, and averred that this was the only contract made by the county in relation to the matter, and denied that any other was made by the board of supervisors: *Held*, that this denial was sufficient to put the plaintiff on proof of the contract: *Murphy v. Napa County*, 20 Cal. 497. In an action against a corporation to recover dividends which have accrued on its stock, if the plaintiff avers, "that from a date named, she was, has been, and still is, the owner in her own right, and as her separate property, of the stock," the answer raises an issue, if it denies that, at the date named, "the plaintiff was, has since been, or still is, the owner in her own right and as her separate property" of the stock. The qualifications of the denial by the words "in her own right and as her separate property" are mere surplusage: *Dow v. Gould and Curry Mining Co.*, 31 Cal. 630.

178. Want of Power to Act.—Where the answer in a suit against a corporation, on its note, relies simply on the want of power of the corporation to issue notes, the defendant cannot afterwards object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so: *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1.

No. 623.

iv. *Want of Capacity—Denial of Trusteeship.*

[TITLE.]

The defendant answers to the complaint:

That since the expiration of said first year [or after theday of187..], he has not been a trustee of said company, and has not in any way managed the affairs or concerns of said company as such.

179. Denial of Subscriptions to Stock.—That he never subscribed for any stock of the corporation mentioned in the complaint, and never be-

came a stockholder in or the holder or owner of any stock of the said corporation, in his own right, or in trust for others.

180. Denial of Interest—Stock Sold.—That on or about the day of, 187 . . , he sold and transferred all his stock and interest in the said company; and that he had not then, nor has he had since that time, nor has he now, any property or interest of any nature or kind whatsoever in the said company, as stockholder, or trustee, or otherwise.

181. Individual Answer.—Stockholders of a corporation, who have been allowed to put in answers in the name of the corporation, cannot be regarded as answering for the corporation itself. In a special case, however, a stockholder may be allowed to become a party defendant, for the purpose of protecting his own interests, and the interest of such stockholders as choose to join with him in the defense: *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283.

182. Non-Joinder of Parties.—Stockholders of insolvent corporations, in Pennsylvania, when sued by creditors, may, under the plea of payment with leave, take advantage of non-joinder of proper parties, and need not plead specially in abatement: *Hoard v. Wilcox*, 47 Penn. 51.

No. 621.

v. *Want of Capacity—Denial of Official Capacity.*

[TITLE.]

The defendant answers to the complaint, and denies that the plaintiff is [executor or administrator of the said deceased, or otherwise], as alleged, or at all.

No. 622.

vi. *Want of Capacity—Partnership of Plaintiff.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the cause of action set forth in the complaint did not accrue to the plaintiff individually, but to the plaintiff and one R. S. under the firm name [giving name of firm], and that said partners, as such, when this action was brought, held and owned the said cause of action jointly.

II. That the said R. S. is still living.

183. Denial.—A mere denial of the act is not a denial of the partnership: *Anable v. Steam Engine Co.*, 16 Abb. Pr. 286.

No. 623.

vii. *Want of Capacity—Partnership of the Defendant.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the contract set forth in the complaint was not made by him individually, but by him and one R. S. jointly as partners, under the firm name [give the firm name].

II. That the said R. S. is still living.

*No. 624.*i. *Want of Consideration—Common Form.*

[TITLE.]

The defendant answers to the complaint:

That he received no consideration for the [promissory note] mentioned therein. [Mistake or any fact showing fraud should be alleged.]

184. How Plead.—In pleading failure of consideration, an issue of law must not be tendered: *Bennett v. Martin*, 6 Mo. 460. An answer of an entire or partial failure of consideration, which does not set out the facts showing the failure, or show how much the whole consideration for the property was, and gives no data by which the court can determine what deduction, if any, should be made, is bad: *Billan v. Hecklebrath*, 23 Ind. 71.

185. Insufficient Plea.—An answer setting up in defense a failure to perform an agreement to execute an indemnifying bond is bad when it does not set forth any injury resulting from such failure, but shows that injury can never happen: *Billan v. Hecklebrath*, 23 Ind. 71.

186. Must be Affirmatively Plead.—All matters in confession and avoidance, showing that the contract sued upon was void or voidable in point of law, must be affirmatively pleaded: *Finley v. Quirk*, 9 Min. 194. It seems that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph of specific grounds of illegality, does not entitle the defendant to prove any grounds of illegality not so specified: *Gushee v. Leavill*, 5 Cal. 161; *Dingeldein v. Third Ar. R. R. Co.*, 9 Bosw. 79. A plea seeking to avoid a bond for being illegally taken should specially state all the facts which show that illegality: *United States v. Sawyer*, 1 Gall. 86. If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void: Cal. Civil Code., sec. 1608. That is not lawful which is contrary to an express provision of law; or contrary to the policy of express law, though not expressly prohibited; or otherwise contrary to good morals: *Id.*, sec. 1667. For certain contracts declared to be unlawful and void, see *Id.*, secs. 1668 to 1676.

187. Partial and Total Failure.—An answer setting up for a defense a failure of consideration must show whether it is a partial or total failure: *Clough v. Murray*, 19 Abb. Pr. 97. A partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase-money of land: *Reese v. Gordon*, 19 Cal. 147. It is generally no defense to a promissory note: *Varnum v. Mauro*, 2 Cranch C. Ct. 425. Partial failure of consideration could not be given in evidence, unless specially pleaded: *Wallace v. Boston*, 10 Mo. 660.

188. Sufficient Averment.—Where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible: *Withers v. Green*, 9 How. U. S. 213.

No. 625.

ii. *The Same—That the Debt was for Money Lost at Play.*

[TITLE.]

The defendant answers to the complaint:

I. That the defendant and the plaintiff played together at a game of chance called, for stakes, upon credit, and not for ready money; and at said games the plaintiff won dollars of the defendant, which he did not pay.

II. That thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost.

No. 626.

iii. *The Same—That the Note was given to Compound a Felony.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That heretofore, on, etc., at, etc., one C. R., the son of the said defendant, had feloniously [here designate the crime—*e.g.*, thus: stolen, taken and carried away, the property of the plaintiff].

II. That the said defendant, in order to compound and settle said felony, gave the said note; in consideration of which the plaintiff and others desisted from informing and prosecuting upon said felony.

III. That there was no other consideration for said note.

189. Form.—From Abbotts' Forms, No. 801.

No. 627.

i. *Want of Jurisdiction of the Person.*

[TITLE.]

The defendant answers to the complaint:

That he was, at the commencement of this action, and is now, Consul of, for the city of, duly accredited to the President of the United States, and by him received and acknowledged as such [or otherwise].

190. Character of the Defense.—Defenses in abatement of the suit or going to the jurisdiction being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue: *Livingston v. Story*, 11 Pet. 351.

191. Corporation.—The fact that a corporation aggregate appears and pleads by attorney to the jurisdiction, is not a waiver of the objection. *Commercial and Railroad Bank of Vicksburg v. Slocumb*, 14 Pet. 60.

192. Foreclosure of Mortgage.—The question of jurisdiction arising in a case where a mortgagor and mortgagee were citizens of the same state, and the mortgagee had assigned the mortgage to a citizen of another state, should have been raised by a plea in abatement. Upon a trial of the merits it was too late: *Smith v. Kernochen*, 7 How. U. S. 198.

193. Must be Specially Plead.—A plea to the jurisdiction in equity is like a plea in abatement at law, which cannot be put in after a general imparlance, or be received when it does not give the plaintiff a better writ: *Baker v. Biddle*, Baldw. 394.

194. Remedy at Law.—The objection that a court of equity has not jurisdiction of the suit, because complainant has an adequate remedy at law, should be taken by plea or answer. It is too late to raise it for the first time upon appeal, unless the want of jurisdiction is apparent on the face of the bill: *Wylie v. Coxe*, 15 How. U. S. 415.

195. Residence.—A defendant who is sued out of his district may plead his personal privilege: *Teese v. Phelps*, 1 McAll. 17.

196. Statement as to Time.—A plea in abatement, denying the truth of the averments as to residence, etc., in the present tense instead of in the past tense, so as to make issue with reference to the time of the commencement of the suit, is not so clearly frivolous as to require the court to set it aside or disregard it: 10 Ad. & E. 17; *Eberly v. Morse*, 24 How. U. S. 147.

197. United States Courts.—Where the jurisdiction of the circuit court of the United States appears by proper averments upon the record, the defendant can only impugn it on a special plea; the objection cannot be taken by answer: Rule 39 in Equity; *Wickliffe v. Owings*, 17 How. U. S. 47.

198. When a Defense.—This defense is sustainable only where the person is not subject to the jurisdiction of the court, and not where the objection is merely that original process has not been duly served: *Nones v. Hope Mutual Life Ins. Co.*, 5 How. Pr. 96; *Bridge v. Payson*, 1 Duer, 614.

199. When Waived. If a plea to the jurisdiction and a plea *non assumpsit* be put in, and the issue be made up on the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on trial, the plea to the jurisdiction is considered as waived: *Bailey v. Dozier*, 6 How. U. S. 23; but see Cal. Code C. P. sec. 434.

No. 628.

ii. *The Same—By Foreign Corporation.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant [foreign corporation] is a corporation created by the laws of the State of [or other foreign government or country], and not by the laws of this State.

II. That the plaintiff is not a resident of this State, but resides at , in the State of

III. That the said [here state facts showing that the cause

of action arose without the State, and is not upon a contract made, executed, or delivered in this State].

No. 629.

iii. *Want of Jurisdiction of the Subject.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the supposed cause of action accrued to the said plaintiff, if at all, out of the jurisdiction of this court; that is to say, at, in the County of, and not at, in the County of, or elsewhere within the jurisdiction of this court, or within the said last named County.

200. Note.—Under our practice, when the action is brought in the wrong county, it is usual to move the court to change the place of trial before answering. If not made before answering, it cannot be made at all.

201. What must be Shown.—In Massachusetts, a plea to the jurisdiction should show that some other court in the same state has jurisdiction: *Lawrence v. Smith*, 5 Mass. 362; *Otis v. Wakeman*, 1 Hill, 604; *The King v. Johnson*, 6 East, 583, 600.

202. A Bar to the Action.—A plea to the jurisdiction, on account of limited jurisdiction, is a plea in bar: *Smith v. McCleod*, 1 Cranch C. Ct. 43. A question as to the jurisdiction of the court cannot be raised under the general issue, but must be specially pleaded: *Eberly v. Morse*, 24 How. U. S. 147; *Teese v. Phelps*, 1 McAll. U. S. 17; the “Abby,” 1 Mason, 360. But where the subject-matter is not within the jurisdiction of the court, the exception may be taken under the general issue: *Maissonnaire v. Keating*, 2 Gall. 325. Although a plea in bar admits the jurisdiction, the district court have power, after such a plea has been put in, to permit the defendant to withdraw it, and plead in abatement a denial that the averments relied on to show jurisdiction were true. It is proper to give leave to amend, thus where the defendant shows by affidavit that the averments as to jurisdiction were false and fraudulent: *Eberly v. Moore*, 24 How. U. S. 147.

CHAPTER IV.

COUNTER-CLAIM.

*No. 630.**Counter-claim Alone.*

[TITLE.]

The defendant answers to the complaint, and for a counter-claim alleges:

That, etc. [State a cause of action precisely as in a complaint.]

Wherefore the defendant demands judgment for dollars.

1. Counter-claim Defined.—The counter-claim mentioned in the California Code must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action: Cal. Code C. P., sec. 438; see, also, *Howard v. Shores*, 20 Cal. 277; *Belleau v. Thompson*, 33 Id. 495. The term "counter-claim" is of recent origin. It seems to be intended to take the place of both "set-off" and "recoupment," neither of which, under those names, are provided for in the California Code. A set-off was unknown to the common law, according to which mutual debts were distinct, and extinguishable, except by actual payment or release: 1 Rawle (Pa.) 203. It was first provided for by statute 2, Geo. II. c. 22, which has been generally adopted in the United States with some modifications. Set-off could only take place in actions on contracts for the payment of money, and the matters which might be set off were mutual liquidated debts or damages. Unliquidated damages could not be set off. The statutes in regard to set-off refer only to mutual unconnected debts; for at common law, when the nature of the employment, transaction or dealings necessarily constitutes an account consisting of payments, debts and credits, the balance only is considered to be the debt, and therefore in an action in such cases it is not necessary either to plead or give notice of set-off: 4 Burr. 2221. The principle upon which statutes of set-off are based is, that mutual debts between the parties are extinguished, if equal in amount, or *pro tanto* if unequal; thus preventing multiplicity of suits. "Recoupment" differs in some essential particulars from set-off: 1. In being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; 2. In having no regard to whether such matters be liquidated or unliquidated; 3. That the right of recoupment is not given or created by statute, but by the common law: see 3 Mich. 281, 287; *Greene's New Pr.* 229. At common law, however, the defendant could not have judgment for any excess in his favor; but it is now otherwise by statute

in most of the states. The case of recoupment falls within the first subdivision of sec. 438, Cal. Code C. P. The second subdivision of the same section includes set-off as it formerly existed, but does not restrict it to cases where the damages sought to be set off are liquidated: See *Wheelock v. Pacific P. G. Co.*, 51 Cal. 226. Upon the general subject of counter-claim, see *Xenia Branch of State B'k of Ohio v. Lee*, 2 Bosw. 694.

2. Cross-complaint.—Where the answer set up a set-off and counter-claim, and prayed for a judgment against the plaintiff for the amount alleged to be due, it is not a cross-complaint, and therefore does not require to be answered by the plaintiff: *Herold v. Smith*, 34 Cal. 122; *Jones v. Jones*, 38 Id. 584. A cross-bill being an auxiliary bill, simply, must be a bill touching matters in question in the original bill: *Cross v. Del Valle*, 1 Wall. U. S. 5. In the United States courts, the filing of a cross-bill on a petition, without the leave of the court, is an irregularity, and such cross-bill may be properly set aside: *Bronson v. La Crosse R. R. Co.*, 2 Wall. U. S. 283.

3. Cross-demands.—When cross-demands have existed between persons, under such circumstances that if one had brought an action against the other, a counter-claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other: Cal. Code C. P. sec. 440. A debtor has a right to purchase cross-demands against a partnership, and set them up as a defense against a debt due by him to the partnership: *Naglee v. Minturn*, 8 Cal. 540; *Marye v. Jones*, 9 Cal. 335.

4. Counter-claim Defined.—A counter-claim is a cause of action, in which a several judgment might be obtained against the plaintiff in favor of the defendant, in an action arising out of the transaction set forth in the complaint and answer, or connected with the subject of the action: *Drake v. Cockroft*, 4 E. D. Smith, 34; S. C., 1 Abb. Pr. 203; *Askins v. Hearn*, 3 Abb. Pr. 184; *Schnaderbeck v. Worth*, 8 Id. 37; *Gottler v. Babcock*, 7 Id. 392; *Barhyte v. Hughes*, 33 Barb. 320; *Mayor, etc., of New York v. Parker Vein Steamship Co.*, 12 Abb. Pr. 300. In an action arising upon contract, it is any other cause of action arising also upon contract, and existing at the commencement of the action: Cal. Code C. P., sec. 438; N. Y. Code, ed. 1877, sec. 501. Or, in other words, a cause of action in favor of the defendant, upon which he might have sued the plaintiff and obtained affirmative relief in a separate action: *Howard v. Shores*, 20 Cal. 277; *Belleau v. Thompson*, 33 Cal. 495. The subject of counter-claim will be found fully discussed, and the extent of the term defined, in *The Xenia Branch of State Bank of Ohio v. Lee*, 2 Bosw. 694: See *Lemon v. Trull*, 13 How. Pr. 248, affirmed by 16 How. Pr. 576; see, also, *Pattison v. Richards*, 22 Barb. 143; *Vassear v. Livingston*, 3 Kern. 248, affirming 4 Duer, 285; *Kneedler v. Sternbergh*, 10 How. Pr. 67; *Welch v. Hazelton*, 14 How. Pr. 97; *Wolf v. H.*, 13 How. Pr. 84.

5. Damages Set Off.—If plaintiff's cause of action is for damages for breach on the part of the defendant, defendant may interpose a counter-claim for damages, for a breach of the same contract by plaintiffs: *Dennis v. Bell*, 30 Cal. 247.

6. Damages, when not Available.—Damages which do not legally result from the breach of the contract cannot be recovered unless they are specially claimed and set forth in the pleading. Thus, damages sustained by vendee of goods by reason of his inability to comply with a contract made by

him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him; and in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in an answer: *Cole v. Swanston*, 1 Cal. 51.

7. Different Transactions.—Matters *ex contractu*, arising out of a different matter from the one in suit, may be proved by way of set-off. So held, as to damages arising from the plaintiff's breach of a sealed contract, entirely disconnected with the note in suit—viz., a covenant that logs floated down a certain stream by the plaintiff should not injure the defendant's land: *Halfpenny v. Bell*, 82 Pa. St. 128.

8. Election of Remedy.—A defendant may elect whether he will set up counter-claim arising out of a contract not connected with the contract upon which the plaintiff's cause of action is based, or whether he will bring a separate action; but as to a counter-claim arising out of the transaction set out in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the plaintiff's cause of action, if he omit to set it up, neither he nor his assignee can afterwards maintain an action thereon: Cal. Code C. P., sec. 439. An omission to assert a cross-claim, when a demand is presented for payment, does not involve a waiver of a counter-claim; nor is a failure to discharge an unfaithful servant, before his term of service has expired, a release of damages arising from his neglect: *Stoddard v. Treadwell*, 26 Cal. 300.

9. Essential Conditions.—The counter-claim mentioned in this section shall be one existing in favor of the defendant, and against the plaintiff: *King v. Wise*, 43 Cal. 628; 4 Abb. Pr. 131, 253; *Duncan v. Stanton*, 30 Barb. 533; *Boyd v. Foot*, 5 Bosw. 110; *Gleason v. Moen*, 2 Duer, 639; *Auburn City Bank v. Leonard*, 20 How. Pr. 193; *Chaffee v. Cox*, 1 Hilt. 78; *Davidson v. Remington*, 12 How. Pr. 310; *Gillespie v. Torrance*, 4 Bosw. 36; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Merrick v. Gordon*, 20 N. Y. 93; *Tyler v. Willis*, 33 Barb. 327; *Van de Sande v. Hall*, 13 How. Pr. 458; *Weeks v. Pryor*, 27 Barb. 79. And it must be existing at the commencement of the action: *Gannon v. Dougherty*, 41 Cal. 661; *Rice v. O'Connor*, 10 Abb. Pr. 362; and at the time belong to the defendant: *Van Valen v. Lapham*, 5 Duer, 689; S. C., 13 How. Pr. 240; *Chambers v. Lewis*, 11 Abb. Pr. 210. To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts: *Naglee v. Palmer*, 7 Cal. 543; commented on in *Duff v. Hobbs*, 19 Id. 646; and approved in *Hobbs v. Duff*, 23 Id. 627; *King v. Wise*, 43 Id. 628.

10. Equitable Defenses.—The defendant may set up an equitable defense in an action at law; but if he relies on an equitable right of action as a defense, he must plead the same as fully as if he were bringing an action in equity: *Carpentier v. The City of Oakland*, 30 Cal. 439; *Bruck v. Tucker*, 42 Id. 346; *Macauley v. Fulton*, 44 Id. 362. Equitable as well as legal demands may be set up as counter-claims: *Currie v. Cowles*, 6 Bosw. 452; and see *Lemon v. Trull*, 13 How. Pr. 248. Thus, a mistake in a contract, and a claim to have it reformed, may be set up as a counter-claim: *Wemple v. Stewart*, 22 Barb. 154. But in cases of an equitable nature, substantially the same limitation is applied as was in respect to filing cross-bills in chancery, which

were allowed only as to matters touching the matters in the original bill: *Burns v. Nevins*, 27 Barb. 493.

11. Equitable Set-off.—A court of equity will compel an equitable set-off, when parties have mutual demands against each other: *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596. Equity will not set-off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts: *Collins v. Butler*, 14 Cal. 227. The set-off will be allowed as between the real parties in interest, regardless of a nominal party: *Hobbs v. Duff*, *supra*.

12. How Alleged.—It is enough if the answer states a cause of action against the plaintiff, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action: *Allen v. Haskins*, 5 Duer, 332. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be stricken out: See facts, *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461. The facts as to how it arose out of the transaction must be stated in the answer: *Brown v. Buckingham*, 11 Abb. Pr. 387. A plea of set-off for money had and received does not permit a recovery of damages for breach of an express contract: *Smith v. Weed S. M. Co.*, 26 Ohio St. 562.

13. Joint Claim.—To justify the allowance of a set-off of joint debt due from plaintiff and another against the individual claim of plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount, and that their property is incumbered by judgments, mortgages, and attachments, without showing that they are insolvent, or that the defendants are in danger of losing their demand: *Howard v. Shores*, 20 Cal. 277.

14. Joint and Several Claims.—A joint claim by two persons cannot be pleaded as a counter-claim by one defendant, but he may amend, and allege that the whole interest therein had been transferred to him; *Stearns v. Martin*, 4 Cal. 229; *Russel v. Conway*, 11 Id. 101; *Collins v. Butler*, 14 Id. 223. Demands being joint and several are not, strictly speaking, due in the same right; yet, if the legal and equitable liabilities or claims of many become vested in or may be urged against one, they may be set off against separate demands, and *vice versa*: *Russel v. Conway*, 11 Cal. 101. Defendants jointly and severally liable to satisfy the plaintiff's demand, may set off a demand due from the plaintiff to one of the defendants alone: *Sledge v. Swift*, 53 Ala. 110; but see *Harris v. Rivers*, 53 Md. 216; *Curtis v. Sprague*, 41 Cal. 59; *King v. Wise*, 43 Id. 628.

15. Must be Specially Pleaded.—Under the plea of general issue, evidence of a counter-claim is not admissible. It should be specially pleaded: *Hicks v. Green*, 9 Cal. 75; *Quinn v. Smith*, 49 Id. 165; *Reese v. Gordon*, 19 Id. 150; *Deneale v. Young*, 2 Cranch C. Ct. 418. It is not enough to allege in general terms that the demand is a counter-claim. It must be stated specifically: *Van Valen v. Laphan*, 5 Duer, 689. To entitle a defendant to set off a claim against a demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off, and when this was not done: *Held*, that the court below properly rejected evidence of the claim proposed

to be set off: *Bernard v. Mullot*, 1 Cal. 368. The pleading must show the existence of the counter-claim at the commencement of the action, and if it does not, it is demurrable: *Gannon v. Dougherty*, 41 Id. 661.

16. Must Defeat Plaintiff's Right.—The demand of a counter-claim must operate in whole or in part to defeat the plaintiff's right of recovery in the action: *Nat. Fire Ins. Co. v. McKay*, 21 N. Y. 191; *Mattoon v. Baker*, 24 How. Pr. 329. The defendant may not only defeat the plaintiff's claim by pleading a set-off, but may recover a balance in excess of that claim: *Ogden v. Coddington*, 2 E. D. Smith, 317.

17. Principal and Surety.—A surety cannot avail himself of a right his principal may have to recover damages for a breach of the principal contract: *Gillespie v. Torrance*, 25 N. Y. 306; *Lafarge v. Halsey*, 4 Abb. Pr. 397.

18. New Matter.—New matter in the answer, which does not constitute a counter-claim, is deemed controverted: *Garner v. The Manhattan Building Association*, 6 Duer, 539.

19. Recoupment.—Counter-claims by way of recoupment may be set off against the claim of plaintiff, in an action arising out of a contract: *Stoddard v. Treadwell*, 26 Cal. 300; *Vassar v. Livingston*, 3 Kern. 248; *Xenia Branch of State Bank of Ohio v. Lee*, 2 Bosw. 694; *Gleason v. Moen*, 2 Duer, 639; *Spencer v. Babcock*, 22 Barb. 326. In such a case, damages may be pleaded as a set-off, and evidence adduced to prove the damages embraced in the counter-claim of defendant: *Stoddard v. Treadwell*, 26 Cal. 300. But they must be specially claimed: *Cole v. Swanston*, 1 Cal. 51; *Hicks v. Green*, 9 Id. 74; *Stoddard v. Treadwell*, 26 Id. 306; or they will not be allowed: *Byxhie v. Wood*, 24 N. Y. 607.

20. Rule of Pleading.—The nature of the claim must be set forth: *Bernard v. Mullott*, 1 Cal. 368. And if sufficiently pleaded, it should not be stricken out: *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461. It must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant: *Vassear v. Livingston*, 13 N. Y. 248, affirming S. C., 4 Duer, 285. And must be separately stated: *Kinney v. Miller*, 25 Mo. 576. Although the Code (N. Y.) does not expressly require the defendant in his answer to state the relief he demands, he must set forth whether he interposes a mere defense or a counter-claim: *Clough v. Murray*, 19 Abb. Pr. 97.

21. Set-off to Set-off.—If the defendant pleads a set-off in his answer, plaintiff may reply a set-off to it: *House v. McKinney*, 54 Ind. 240.

22. Statement Must be Express.—The statement should be expressly as a counter-claim; for if it is only in the form of a defense to the action, the defendant may lose the benefit of affirmative relief: *Bates v. Rosekrans*, 23 How. Pr. 89; compare *Burrall v. De Groot*, 5 Duer, 379.

23. Unliquidated Claims.—Unliquidated damages may be the subject of off-set, if arising upon contract: *Wheelock v. Pacific P. Gas Co.*, 51 Cal. 226; *Schubart v. Harteau*, 34 Barb. 447; *Mayor, etc., of N. Y. v. Mabie*, 13 N. Y. 151; *Gage v. Angell*, 8 How. Pr. 335.

24. What it Admits.—In considering a counter-claim upon demurrer to it for alleged insufficiency, the facts alleged in the complaint, which are not inconsistent with the averments in the counter-claim, are to be taken as admitted: *Graham v. Dunnigan*, 4 Abb. Pr. 426.

CHAPTER V.

SEVERAL DEFENSES.

*No. 631.**Demurrer and Answer.*

[TITLE.]

The defendant demurs [or the defendants, naming them, if only a part of them join, demur] to the first [or other] cause of action stated in the complaint, on the following grounds:

First. [State the grounds.]

Second. And for answer to the plaintiff's complaint, the defendant alleges:

That, etc.

1. Demurrer and Answer.—The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue, or may demur and answer at the same time: Cal. Code C. P., sec. 431; *People v. McClellan*, 31 Cal. 101. This, however, does not justify the mixing of law and fact in the same answer: *Brooks v. Douglass*, 32 Cal. 208. But he cannot demur to part of an entire cause of action, and answer the residue; nor can he, in New York, demur and answer at the same time to the same cause of action: See note 2, *post*; *Ingraham v. Baldman*, 12 Barb. 10; *Struver v. Ocean Ins. Co.*, 16 How. Pr. 422; *Munn v. Barnum*, 12 Id. 563; 1 Abb. Pr. 281. This is similar to the rule in chancery: *Clarke v. Phelps*, 6 Johns. Ch. 214; *Bruen v. Bruen*, 4 Edw. 640; *Souzer v. De Meyer*, 2 Paige, 574; *Jarvis v. Palmer*, 11 Id. 650; *Spofford v. Manning*, 6 Id. 383. A demurrer to a part of a bill, followed by an answer as to the rest, is not deemed overruled or withdrawn: *Pierpont v. Fowle*, 2 Woodb. & M. 23. When the objection must be taken by demurrer, when by answer, see *Brainard v. Jones*, 11 How. Pr. 569.

2. Objections, how Taken.—Defects which appear on the face of the complaint must be objected to by demurrer, or they are waived, and cannot be objected to by answer; so with a defect of parties: *Zabriskie v. Smith*, 13 N. Y. 322. And the same cause of action cannot be demurred to and answered at the same time: *Slocum v. Wheeler*, 4 How. Pr. 373; *Spellman v. Weider*, 5 Id. 5; *Munn v. Barnum*, 1 Abb. Pr. 281. As the answer overrules the demurrer: *Jarvis v. Palmer*, 11 Paige, 650; *Spofford v. Manning*, 6 Id. 383. But in California he may both answer and demur at the same time to each several cause of action: *People v. McClellan*, 31 Cal. 101; Code C. P., sec. 431. Nor will the court allow a party to withdraw his answer and demur: *Finch v. Pindon*, 19 Abb. Pr. 96. But the defendant may demur to one count and answer to the other: *Ingraham v. Baldwin*, 12 Barb. 9. An objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action, can be taken at any time: Cal. Code C. P., sec. 434.

3. Several Modes of Defense.—It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defense—he may demur, answer, and plead to different parts of the bill; so that if a bill for discovery and relief contain proper matter for the one, and not for the other, the defendant should answer the proper, and demur to the improper matter; and if he demur to the whole, the demurrer will be overruled: 5 Johns. Ch. 186; 1 John. Cas. 433; *Livingston v. Story*, 9 Pet. 632.

4. What Answer Waives.—An answer and demurrer may be interposed at the same time. But filing an answer is a waiver of the demurrer previously interposed: *DeBoom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, Id. 470; *Brooks v. Minturn*, Id. 481; *Bibend v. Kreutz*, 20 Id. 109; *Hodgson v. Marine Ins. Co.*, 1 Cranch C. Ct. 569; *Irwin v. Henderson*, 2 Id. 167; and of irregularities previously set up in demurrer: *Bell v. Railroad Co.*, 4 Wall. U. S. 598. It is also a waiver of alleged error as to change of parties by substituting one defendant for another without notice: *Smith v. Curtis*, 7 Cal. 584. An answer cannot properly set up an objection which appears upon the face of the complaint where a demurrer upon that ground had been overruled: *Tennant v. Pfister*, 45 Id. 272. But objections which are subjects of demurrer, but do not appear upon the face of the complaint, may be taken by answer: Cal. Code C. P., sec. 433. An equitable defense to an action at law for money had and received, must be pleaded: *Marks v. Sayward*, 50 Cal. 58.

No. 632.

Several Defenses, and a Counter-claim.

[TITLE.]

The defendant answers to the complaint:

First. To the first cause of action:

I. That he denies each and every allegation in the first paragraph thereof.

II. [That as to the second paragraph thereof he has no knowledge, information, or belief, sufficient to enable him to answer the same or any allegation thereof, and he therefore denies each and every allegation therein contained.

Second. To the second cause of action he answers:

That the note mentioned therein is not his note.

Third. To the third cause of action he answers, and avers:

1. For a first defense:

I. That it was a part of the agreement referred to in the complaint that the plaintiff should not sell goods for any other person than the defendant.

II. That the plaintiff, during the period of his service mentioned in the complaint, sold sundry goods for one

B. S., and for other persons whose names are unknown to the defendant, without the defendant's consent.

2. For a second defense:

That he has fully paid the plaintiff for his services.

Fourth. For a counter-claim:

I. That between the.....day of....., 187., and the.....day of....., 187., the plaintiff received from D. A.....dollars, for the use of the defendant.

II. That he has not paid the same.

Wherefore the defendant demands judgment for.....dollars, with interest from the.....day of....., 187..

5. Cross-complaint and Counter-claim.—A cross-complaint bears a close resemblance to a counter-claim. The distinction is subtle, but is none the less definite. The cross-complaint brings in more comprehensive matter than a counter-claim, and includes any just cause of action as a set-off to the plea of plaintiff. When the answer contains a cross-complaint, a reply is necessary, in default of which all matters alleged in the cross-complaint will be taken as confessed. Such replication is not necessary to a counter-claim: *Herold v. Smith*, 34 Cal. 122. A cross-complaint must in itself state all the requisite facts to entitle the defendant to affirmative relief, and defects in it cannot be cured by averments of any of the other pleadings in the action: *Kreichbaum v. Melton*, 49 Id. 50. The same requisites are essential in a counter-claim: *Quinn v. Smith*, Id. 163.

No. 633.

Several Defenses—Another Form.

[TITLE.]

The defendant [or defendants severally, each for himself], answers to the complaint:

First. For a first defense:

I. As to the first cause of action set forth in the complaint, that no allegation thereof is true.

II. That on, etc. [Set out defense.]

Second. For a defense to the second cause of action set forth in the complaint, the defendant alleges: [Set forth defense.]

Third. For a third defense:

And by way of counter-claim [or set-off, or cross-complaint] to the [first] cause of action set forth in the complaint, the defendant alleges: [Set forth a cause of action against the plaintiff.]

6. Commencement and Conclusion. — It is proper that each defense should indicate distinctly, by fit and appropriate words, where it commences

and where it concludes: *Lippencott v. Goodwin*, 8 How. Pr. 242; *Benedict v. Seymour*, 6 Id. 298. But no formal commencement or conclusion is prescribed: *Bridge v. Payson*, 5 Sandf. 210.

7. Each Defense must be Complete.—One defense cannot refer to another in the same answer for support: *Xenia Branch Bank v. Lee*, 2 Bosw. 694; S. C., 7 Abb. Pr. 372; *Spencer v. Babcock*, 22 Barb. 326. But it was held in *Rice v. O'Connor*, 10 Abb. Pr. R. 362, that several defenses in one statement is not bad on demurrer. Upon a demurrer to a distinct defense, stated separately in an answer, no resort can be had to other portions of the answer to sustain such defense; for each defense must be complete in itself: *Siter v. Jewett*, 33 Cal. 92; 7 Abb. Pr. 372; 10 Id. 246; 4 Bosw. 391; *Jackson v. Van Slyke*, 44 Barb. 116. One separate defense, if defective in any material averment, cannot be aided by the averments of another separate defense: *Catlin v. Pedrick*, 17 Wis. 88.

8. Each Defense Specific.—When the complaint contains more than one cause of action, the answer should indicate to which cause of action each defense is interposed: *Kneedler v. Sternbergh*, 10 How. Pr. 67. If the substance of the defense clearly shows to which cause of action it is addressed, it is sufficient on demurrer: *Willis v. Taggard*, 6 How. Pr. 433.

9. Issues on Several Defenses.—If one of several pleas of a defendant going to the whole cause of action is sustained, it bars recovery by the plaintiff, notwithstanding some other issues may be found in favor of the plaintiff: *Curtis v. Jones*, 1 How. App. Cases, 137. What judgment should be rendered when one of two pleas is found for the plaintiff, and the other for the defendant, see *Dorsey v. Chenault*, 2 Cranch C. Ct. 316; *Kerr v. Force*, 3 Id. 8.

10. Joint Answer.—A joint answer to a bill in chancery, if sworn to by all the parties, is sufficient; a joint and several form is not indispensable: *Davis v. Davidson*, 4 McLean, 136. Where a joint answer of several defendants denies an allegation in the complaint which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises material issue for the defendants as to whom the plaintiff must prove such allegation: *Bank of Cooperstown v. Corlies*, 1 Abb. Pr. R. (N. S.) 412. Where a plea states that the defendants come and defend, etc., it will be construed that all defendants are joined: *Kerr v. Swallow*, 33 Ill. 379.

11. Must be Consistent.—Several defenses may be set up in an answer: Cal. Code C. P., sec. 441; but if they are contradictory, it is bad: *Bell v. Brown*, 22 Cal. 671; *Hopper v. Hopper*, 11 Paige, 46. A sworn answer must be consistent, and not deny in one sentence what it admits in another sentence: *Kuhland v. Sedgwick*, 17 Cal. 123; *Hensley v. Tartar*, 14 Id. 508; *Robinson v. Stewart*, 10 N. Y. 189; *Storer v. Coe*, 2 Bosw. 662; *Manice v. N. Y. Dry Dock Co.*, 3 Edw. Ch. R. 146; *Willett v. Metropolitan Ins. Co.*, 2 Bosw. 678. Several defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer: *Bell v. Brown*, 22 Cal. 671. But where an answer is susceptible of being construed to contain either of two defenses, one of payment, and the other of counter-claim, it should be construed as setting up only the defense of payment and requiring no reply: *Burke v. Thorne*, 44 Barb. 363. As to inconsistencies in the answer, see *Hol-*

lenbeck v. Clow, 9 How. Pr. 289; *Lansingh v. Parker*, Id. 288; *Stiles v. Comstock*, Id. 48. The inconsistent defenses which are allowed to be pleaded in a verified answer, are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance, as contradistinguished from denials where the party impliedly or hypothetically admits, for the purpose of that particular defense, a fact which he notwithstanding insists does not in truth exist: *Bell v. Brown*, 22 Cal. 671. If no objection be taken to an answer, by a motion to strike out, or by demurrer, which sets up inconsistent defenses, defendant may, on the trial, rely on any one of such defenses: *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrell*, 25 Id. 35. If a defendant, in his answer, admits a material allegation of the complaint, he cannot afterwards contest it: *Howard v. Throckmorton*, 48 Id. 482; see, also, *Spanagel v. Reay*, 47 Id. 608.

12. Prayer in Answer.—In an action to recover personal property, or to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff: *Gould v. Scannell*, 13 Cal. 430. A formal prayer is not necessary in an answer, when no counter-claim is set up: *Bendit v. Annesley*, 42 Barb. 192.

13. Separate Answer.—In actions against several defendants, each may answer separately: 2 Saund. Pl. and Ev. 18, 19. But dilatory defenses must be common to all: *Hurley v. Secord Bldg. Assn.*, 15 Abb. Pr. 206. Against several executors, those served first, or who appear first, may answer for estate: *Salters v. Pruyn*, 15 Abb. Pr. 224.

14. Several Defenses.—The defendant may set forth by answer as many defenses and counter-claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished: Cal. Code, C. P. sec. 441; N. Y. Code, ed. 1877, sec. 507; *Bennett v. Leroy*, 14 How. Pr. 178; 5 Abb. Pr. 55; 6 Duer, 683. Separate allegations of matters in avoidance are admissible in connection with the general denial: *Kellogg v. Baker*, 15 Abb. Pr. 286.

15. Several Demands—Set-off.—Several demands against the plaintiff, which are available to the defendant as a set-off, may be pleaded in one defense, each being separately described: *Ranney v. Smith*, 6 How. Pr. 420. It would seem to be otherwise of counter-claims.

16. Title.—Title of a cause is not part of a plea: *Bank of Columbia v. Ott*, 2 Cranch C. Ct. 529.

FORMS OF ANSWERS—SUBDIVISION FIRST.

In Actions for Debt.

CHAPTER I.

ANSWERS ON ACCOUNTS.

No. 634.

Plea of an Account.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That after the said dealings in said complaint named, and before the commencement of this action, to wit: on theday of....., 187..., the said A. B. and C. D. came to a mutual accounting touching the several matters and things in said complaint mentioned.

II. That on the said accounting, there was found due from the said A. B. to the said C. D. dollars, as a final balance upon said mutual dealing and matters between the said A. B. and C. D.

III. And the said C. D. avers that the said stated account is just and true.

Wherefore he claims judgment against the plaintiff for said sum ofdollars, and interest from said day of....., 187..., and costs.

1. Advances.—In an action by a commission merchant to recover balance of an account, principally for advances, defendant set up an agreement not to sell the goods consigned below a certain price, and a violation by the plaintiff of such agreement, by which defendant was damaged for a greater amount than the sum sued for; the plea was insufficient for not stating when the agreement was made: *Grimes v. Reese*, 30 Ga. 330.

2. Adjustment and Settlement.—Adjustment and settlement of an account must be specially averred: *Parker v. Lowell*, 11 Gray (Mass.), 353. It is not proper to frame an answer, as responsive to a bill of particulars: *Scovell v. Howell*, 2 Code R. 33; *Kreiss v. Seligman*, 8 Barb. 439.

3. Denial of Mistakes or Errors.—That there are no such mistakes and errors in the stating of the said account, in manner and form as the said plaintiff hath in his said petition alleged. On surcharging and falsifying an account stated, the mistake or error should be distinctly charged: *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Leycraft v. Dempsey*, 15 Wend. 83.

4. Denial of Mutual Dealings.—That there are no such mutual dealings and accounts between the said plaintiff and defendant, in manner and form as the said plaintiff hath in his said petition alleged. By mutual account, is meant the mutual receipt, one from the other, of something of value, other than money. The payment of money does not, in general, make an account mutual: See vol. i., p. 282 *et seq.*

5. On Information and Belief.—When the action is upon an account, and defendant in his answer avers, in the form of reasons for refusing payment when the account was presented to him before suit, that the principal portion was composed of items for printing done for clients, for which he never became personally bound, and that the portion for which he was personally liable “has, to the best of his knowledge and belief,” been paid and satisfied, and therefore he pleads payment of the same: *Held*, that this is in substance a denial of indebtedness for a portion of the account, and a plea of payment for the balance; and that it is in effect an admission as to that balance of an original liability, and throws the burden of establishing payment upon the defendant: *Caulfield v. Sanders*, 17 Cal. 569.

6. Overcharge.—The items of an account stated which are overcharged, must be specially pleaded: *Terry v. Sickles*, 13 Cal. 427. The proper mode of raising an objection to the amount of the plaintiff’s claim, is by answer: *Moran v. Anderson*, 1 Abb. Pr. 288.

7. Partnership Account.—A denial by one of the defendants in suit on a partnership account, stating that “he never was a copartner” is sufficient to form an issue: *Corning v. Haight*, 1 Code R. 72.

8. Several Defenses.—In an action to recover many items of demand, defendant may plead one defense to some of the items, and another defense to others: *Longworthy v. Knapp*, 4 Abb. Pr. 115.

9. Statute of Limitations.—To suit on an account, defendant averred that each and every item of said account prior to the tenth day of March, 1859, is barred by time; and he pleads and relies upon the statute of the state of California, entitled “An act defining the time of commencing civil actions,” approved April 22, 1850, in bar of any recovery in said action: *Held*, that this plea is fatally defective, because an averment of a conclusion of law; that a plea of the statute of limitations must aver the facts which bring the demand within the operation of the statute, as that the alleged cause of action has not accrued within certain designated years previous to filing the complaint: *Caulfield v. Sanders*, 17 Cal. 569. When the account is not a mutual one, the statute of limitations bars each item of the same, two years after its delivery: *Adams v. Patterson*, 35 Cal. 122.

10. What must be Shown.—To suit on an account, the plea must aver the facts which bring the demand within the operation of the statute: *Caulfield v. Sanders*, 17 Cal. 569; *Lick v. Diaz*, 30 Cal. 65; and not state matters of law: *Boyd v. Blankman*, 29 Id. 20. A defendant who claims the benefit of an act for the limitation of actions, which applies only to a particular class of cases, must plead it specially: *Howell v. Rogers*, 47 Id. 293. This defense should point to the time of filing the original complaint, and not an amended complaint: *Lorenzana v. Camarillo*, 45 Id. 128. The words “preceding the commencement of this action” are equivalent to the words “preceding the filing of the complaint.” *Adams v. Patterson*, 35 Id. 122. For statutory form of pleading the statute of limitations, see Cal. Code C. P., sec. 458.

CHAPTER II.

ANSWERS ON AWARDS.

*No. 635.**Invalidity of an Award.*

[TITLE.]

The defendant answers to the complaint:

That by the terms of the agreement referred to in the complaint, the arbitrators were to hear the evidence and arguments of both parties at meetings called upon notice to both, but that they refused to hear the evidence offered by defendant, and failed and refused to give defendant notice of the said meetings, or any of them.

Wherefore, etc. [Judgment may be demanded, setting aside the award, if desired].

NOTE.—For various points and authorities upon the subject of awards, see *ante*, vol. 1 p. 292 *et seq.*

1. **Denial of Award.**—That the said arbitrators [or umpire] did not make and publish any award [or the award alleged in the complaint]. If the defendant relies upon an irregularity in the award, of an excess of power on the part of the arbitrators, it is better to allege the act expressly.

2. **Denial of Parol Submission.**—That he did not agree or promise as alleged. It was held at common law that where a party desires to question the legal effect of a submission or award, he must set it out and demur: *Fidler v. Cooper*, 19 Wend. 285.

3. **Denial of Performance by Plaintiff.**—That the defendant did not perform the award upon his part, but on the contrary omitted to [set forth his omission].

4. **Denial of Revocation by Defendant.**—That he did not revoke the powers of the arbitrators, as alleged in the said complaint.

5. **Performance by Defendant.**—That the defendant duly performed the award on his part, and upon the day of 187.. [state what was done].

CHAPTER III.

ANSWER ON EXPRESS PROMISES.

*No. 636.**Denial of Promise.*

[TITLE.]

The defendant answers to the complaint and denies:

That he promised or agreed as alleged in the said complaint, or that he made any agreement in respect to the matters stated in the complaint.

CHAPTER IV.

ANSWER FOR GOODS SOLD AND DELIVERED.

*No. 637.**i. Controverting Plaintiff's Title.*

[TITLE.]

The defendant answers to the complaint.

That no part of the goods, wares, and merchandise in the complaint mentioned was the property of plaintiffs when sold to defendant; but the same then was the property of one A. B. and who alone, and not the plaintiff, sold the same to this defendant.

*No. 638.**ii. The Same—Reducing Value, and Pleading Payment.*

[TITLE.]

The defendant answers to the complaint:

I. That he promised to pay the plaintiff dollars only, and no other or greater sum.

II. That he has paid the said sum to the plaintiff.

1. Conclusion of Law.—If the complaint avers the sale and delivery to defendant of goods, and the value of the same, an answer which denies the indebtedness, but does not deny the facts, the sale and delivery, and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts: *Lightner v. Menzell*, 35 Cal. 452; *Curtis v. Richards*, 9 Cal. 33; *Wells v. McPike*, 21 Id. 215; *Edson v. Dillaye*, 8 How. Pr. 273; *Flammer v. Kline*, 9 How. P. 216; *Drake v. Cockroft*, 10 How. Pr. 377; 1 Abb. Pr. R. 203; *Cal. St. Tel. Co. v. Patterson*, 1 Nev. 151; see *ante*, vol. 1, p. 117.

2. Conjunctive Denials.—Where the complaint verified avers that defendant is indebted to plaintiff for goods, wares and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that the defendant is indebted in the sum of eight hundred and twenty-eight dollars and sixteen cents, the denial is insufficient: *Higgins v. Wortell*, 18 Cal. 330; *Woodworth v. Knowlton*, 22 Id. 164; *Doll v. Good*, 38 Id. 287.

3. Statute of Limitations.—When the complaint states a cause of action for goods sold and delivered, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer which refers to the exhibit and avers that the last item only is within two years previous to the commencement of the action, and that, except as to the last item, "no action has accrued to said plaintiff by reason of the matter mentioned and set forth in said complaint at any time within two years next preceding the commencement of this action," is a good answer of the statute of limitations, to all the items except the last: *Adams v. Patterson*, 35 Cal. 122.

4. Accord and Satisfaction.—To a declaration for goods sold and delivered, claiming one hundred and twenty pounds, the defendant pleaded: (1) never indebted; (2) “and for a further plea,” that after the commencement of the suit, and after the last pleading, it was agreed that the plaintiff should accept from the defendant sixty pounds, in settlement of the debt sought to be recovered in the action; and the defendant paid, and plaintiff accepted, sixty pounds in satisfaction and discharge of said debt. On demurrer to the second plea: *Held*, that the plea, being pleaded generally, must be taken to be pleaded to the whole cause of action; and as it alleged the payment after action brought to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiff might be entitled: *Ash v. Pouppeville*, Law Rep. 3 Q. B. 86.

No. 639.

iii. *The Same—Agreement to Take Note in Part Payment.*

[TITLE.]

The defendant answers to the complaint:

I. That said goods were sold and delivered to said defendant by said plaintiff, on an express agreement, by and between them, that said plaintiff should accept in payment therefor, a promissory note for the sum of dollars, drawn by this defendant, and dated on the day of, 187.. [with an approved indorser].

II. That on the day of, 187.., and before this action, the defendant tendered to the plaintiff such a note as above described, indorsed by one C. D. who was then and still is, in good credit and ability, and an approved indorser, and is still ready and willing to deliver the same.

III. That the defendant refused to receive the same.

5. Credit not Expired.—In an action for goods sold, an answer admitting the purchase of the goods, but averring that they were purchased on a credit not expired, is not a statement of new matter constituting a defense, but merely a special denial of the plaintiffs’ allegation “that defendant is now indebted to the plaintiffs,” a denial of the contract set up by the plaintiffs: *Gilbert v. Cram*, 12 How. Pr. 455.

6. Sufficient Answer.—The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt, and alleged facts attending the transaction, which, if true, avoided its effect as payment, by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand, and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings, and plaintiff had judgment: *Held*, that the judgment was

erroneous; that the allegations of the complaint in reference to the transaction, claimed to operate as payment, were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them: *Canfield v. Tobias*, 21 Cal. 349.

No. 640.

iv. *The Same—Articles Furnished Defendant's Wife not Necessary.*

[TITLE.]

The defendant answers to the complaint:

I. That the articles mentioned therein were not furnished to his said [wife or child] with his consent.

II. That the same were not necessary for his [wife or child].

7. **When not Liable.**—A wife who without cause, and against her husband's will, refuses to live with him, cannot bind him for necessities to a third party who knows that she is not living with her husband, and who sells to her without further inquiry: *Brown v. Mudgett*, 40 Vt. 68.

CHAPTER V.

ANSWER ON GUARANTY.

No. 641.

i. *General Form.*

[TITLE.]

A. B. and C. D., two of the defendants in the above-entitled action, separately answering the complaint of the plaintiff in this said action:

I. Deny that they, or either of them, made the written guaranty set forth in the said complaint.

II. They deny that the [ale contained in the barrels] mentioned in said complaint [did sour during its voyage], or that it was [unfit for use] when it arrived here.

Wherefore defendants, A. B. and C. D., pray to be dismissed with their costs.

1. **Denial of Plaintiff's Performance.**—Denies that the plaintiff did supply the goods to the said A. B. alleged in the complaint, or any part thereof.

*No. 642.*ii. *The Same—Departure from Guaranty.*

[TITLE.]

The defendant answers to the complaint:

I. That the defendant did not agree to be answerable generally to the plaintiff for the value of goods sold to the defendant, but only for goods to an amount not exceedingdollars, which limit the plaintiff exceeded in his alleged sale.

2. **Mistake.**—In an action upon contract an answer which seeks to set up a mistake in the instrument embodying it, must state what was the actual agreement, and the mistake in reducing it to writing: *Wemple v. Stewart*, 22 Barb. 154; and see *Barton v. Sackett*, 3 How. Pr. 358.

3. **Rent.**—In an action against sureties, to recover rent, the defendants alleged in their answer and proved that they understood they were to be sureties as for a rent of nine hundred dollars, and that the guaranty was executed by them under a mistake of facts; but it was not averred in the answer or proved that the plaintiff had the same understanding of the agreement: *Held*, that neither the matter set up in the answer nor the proof was sufficient to authorize a reformation of the contract so as to conform it to the understanding of the defendants: *Lanier v. Wyman*, 5 Rob. 147.

CHAPTER VI.

ANSWERS ON INSURANCE.

*No. 643.*i. *Denial of Policy.*

[TITLE.]

The defendants answer to the complaint:

I. That they did not make or deliver the policy of insurance alleged.

*No. 644.*ii. *The Same—Denial of Plaintiff's Interest.*

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff did not own, and had no insurable interest in the said goods [or building, etc.], at the time of the happening of said loss.

*No. 645.*iii. *The Same—Denial of Loss.*

[TITLE.]

The defendant answers to the complaint:

I. That the said building was not destroyed [or injured], during the term of said insurance by [state perils], but said loss occurred wholly by [indicate the excepted peril].

1. Conditions in Policy.—Denial of all liability on a policy, on the ground that the loss was not from a peril insured against, is a waiver of proof of loss, required in the policy, as also of an allowance therein to the insurers of sixty days in which to pay. A policy of insurance on real and personal property contained a false warranty as to incumbrances on the realty; the personal property was separately valued and appraised; it did not appear that said warranty was an inducement to its insurance; *Held*, that plaintiff could recover the value of the personal property: *Koontz v. Hannibal Savings and Ins. Co.*, 42 Mo. 126.

*No. 646.*iv. *The Same—Policy Obtained by Misrepresentations.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the defendant was induced to subscribe the policy, and become insurer, as alleged in the complaint, by the misrepresentation made by the plaintiff to the defendant of a fact then material to be known to the defendant, and material to the risk of the said policy; that is to say [state misrepresentation].

2. Condition in Policy.—A condition in a policy that fraud or false swearing shall forfeit all claim, relates only to the preliminary proofs, and a plea founded upon such condition must allege that the fraud, etc., was committed in those proofs, and that it was committed by the plaintiff or some party in interest: *Ferris v. North American Fire Ins. Co.*, 1 Hill, 71. If a policy of insurance contains a clause that if the assured keep gunpowder, the same shall be void, and the complaint avers that the plaintiff faithfully complied with the terms of the policy, and the answer does not deny the same, nor set up as new matter the keeping of the gunpowder, the fact cannot be insisted on as a defense: *Cassacia v. Phoenix Ins. Co.*, 28 Cal. 628.

3. Fraud and False Swearing.—Upon the question of fraud and false swearing by the insured, so as to deprive him in case of a loss of any benefit under the contract, any discrepancy found to exist between his sworn statement of his losses, and the actual loss, which can reasonably be accounted for on the score of opinion, is entitled to no weight. Such discrepancy will be considered as evidence of fraud or false swearing only when it is such as to show a material and intentional over-valuation by him: *Clark v. Phoenix Ins. Co.*, 36 Cal. 168.

4. Note.—State misrepresentations in like manner in life or accident

policy. It is not deemed necessary to give a form for every defense arising under this class of actions. The defendant should state particularly and specifically in what respect the assured had vitiated the contract by fraud or mistake; or in what regard, or on what account the defendant had ceased to be liable under the policy. Defenses to life and accident policy of insurance are not favored by the courts, unless very clearly meritorious.

No. 647.

v. *The Same—Transfer without Insurer's Consent.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That it is among other things provided by said insurance policy, that in case of any transfer or termination of the interest of the insured, either by sale or otherwise of the property insured, without the consent of the company, the policy should from thenceforth be void.

II. That after the making of said policy, and before the loss alleged, the interest of the said [insured] in said [things insured] was terminated and transferred, and the title thereto vested in said plaintiff without the consent of the defendants, whereby the policy became and was void, at the time of said loss.

NOTE.—This form and the next are from Abbott's Forms, Nos. 906 and 910.

No. 648.

vi. *The Same—Unseaworthiness of Vessel.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. [Allege provisions of policy, unless it appears by the complaint.]

II. That at, and in the course of said voyage, and in reference to the said voyage, and to any damage which the said ship sustained in the prosecution thereof, a regular survey was had on the day of, 187 . . ., upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten [or state particulars showing a ground of condemnation wholly within the provisions of the policy.]

5. Form.—This form was held good in *Griswold v. National Ins. Co.*, 3 Cow. 96.

6. Special Matter.—In an action of covenant on a policy under seal, any special matter of defense must be pleaded: *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206. As to the manner of pleading a want of seaworthiness to an

action on a time policy, see *Jones v. Insurance Co.*, 2 Wall. jr. C. Ct. 278. In an action on a policy of marine insurance, the defendant's remedy to compel a disclosure by the plaintiff of the number of packages, or the quantity and nature of the cargo lost or injured, and the items of expenses incurred, is by requiring a bill of particulars, rather than by motion to make the complaint more definite: *Cockcroft v. Atlantic Mut. Ins. Co.*, 9 Bosw. (N. Y.) 681.

CHAPTER VII.

ANSWERS ON JUDGMENTS.

No. 649.

i. *Denial of Judgment.*

[TITLE.]

The defendant answers to the complaint, that there is no record of said judgment.

1. Accord and Satisfaction.—A parol agreement to deliver up a judgment with the execution thereon issued, "to be satisfied" in consideration of the settlement of and indemnification against a claim which is being made by a third party, is binding, and is a complete defense to a suit on the judgment, although the promise was made to and the consideration came from but one of the defendants: *Cobb v. Cowdery*, 40 Vt. 25. Where a defendant alleged in his affidavit of defense an agreement to receive in satisfaction a smaller sum of money at a time sooner than the debt fell due, and a tender to the counsel of the creditors, without alleging an acceptance by either the plaintiff or his counsel, it was held that there was no execution of the accord, and no satisfaction, and that the defense failed: *Hearn v. Kiehl*, 38 Penn. 147. A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as a satisfaction in full, will not discharge the judgment: *Deland v. Hiatt*, 27 Cal. 611. But this rule has been changed by statute, for now, by agreement between creditor and debtor, a less sum than the whole amount may be paid and received in full payment and discharge of any indebtedness, if such agreement be clearly manifested by a receipt or instrument in writing signed by such creditor: see Cal. Civ. Code, sec. 1524. Before suit was brought, the plaintiffs agreed with their attorneys that they should have one third of the judgment and costs as compensation. After judgment and execution, the plaintiffs compromised for less than the amount of the judgment, and entered satisfaction upon the record: *Held*, that the attorneys had no lien on the judgment, and could not disturb the satisfaction as entered: *Mansfield v. Dorland*, 2 Cal. 507; see *Ex parte Kyle*, 1 Cal. 331.

2. Another Action Pending.—A plea to an action on a judgment, alleging that the plaintiff, at the time of commencing the suit, was seeking to enforce the collection of an execution issued on the same judgment, is a good bar to the action: *Yantis v. Burdett*, 3 Mo. 457.

3. Assignment.—Where a judgment against which a right to set off another judgment, rendered in the same action, exists, is assigned, the assignee

may be brought into the court upon a proceeding by petition and motion, and will be bound by an order therein directing a set-off: *Porter v. Liscom*, 22 Cal. 430.

4. Denial of Judgment.—A debt cannot be denied without denying the instrument on which it is founded. Hence a plea of *nil debet* is a bad plea in an action founded on a judgment: *Sneed v. Wister*, 8 Wheat. 690; *United States v. Spencer*, 2 McLean, 405. If it is desired to attack the judgment, the plea should be *nul tiel record*: *Mills v. Duryee*, 7 Cranch, 481; *Bastable v. Wilson*, 1 Cranch C. Ct. 124; *Short v. Wilkinson*, 2 Id. 22; *Armstrong v. Carson*, 2 Dall. 302; *Bergen v. Williams*, 4 McLean, 125; *French v. Lafayette Ins. Co.*, 5 McLean, 461. On a *nul tiel record*, an untrue statement of the circumstances descriptive of the record, though unnecessary to be stated at all, is fatal, as such a plea puts the identity of the record in question: *Laws on Plead.* 370; *Whitaker v. Bramson*, 2 Paine, 209. Such a plea brings before the court the validity of the judgment, and the description of it as given in the declaration: *Jacquette v. Hugunon*, 2 McLean, 119. When the record set forth in a declaration is not the foundation of the action, but only matter of conveyance or inducement, *nul tiel record* is not a good plea, for it is no answer to the whole count: *United States v. Little*, 3 Cranch C. Ct. 251.

5. Judgment for Costs.—A judgment in favor of a defendant, for costs, based upon a finding of one of several issues in his favor by the jury, even if erroneous, is not void. While unreversed, it is to be treated, for the purpose of set-off, as a valid judgment: *Porter v. Liscom*, 22 Cal. 430.

6. On Appeal.—The pendency of a writ of error might be pleaded in abatement, but not in bar. The plea must state that the writ was brought prior to the present suit, and the requisite steps taken to render it a *superseas* to the execution. *Jenkins v. Pepoon*, 2 Johns. Cas. 312.

7. Payment.—A plea of payment to an action of debt, founded on a judgment rendered in Kentucky, containing an averment that by the law of that state such a plea to such a declaration is good, puts in issue the law of Kentucky, and should be replied to: *Hutchinson v. Patrick*, 3 Mo. 65.

8. Set-Off.—A person may receive the money due on a judgment rendered in favor of himself and several others, co-plaintiffs, but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and them jointly, against another judgment held by the defendant in such joint judgment against himself alone: *Corwin v. Ward*, 35 Cal. 195. When judgments in different courts are to be set off, the moving party must go into the court in which the judgment against him was recovered: *Russell v. Conway*, 11 Cal. 101. A judgment assigned to a sheriff cannot be set off against another judgment against said sheriff for seizing certain exempt property under an execution issued upon the judgment so assigned. Such set-off would defeat the purpose of the exemption law: *Beckman v. Manlove*, 18 Cal. 389. Where, in the same action, two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum: *Held*, that defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that his right could not be defeated by any assignment by plaintiff of his judgment before application of the set-off: *Porter v. Liscom*, 22 Cal. 430. It is not necessary that the demand sought to be used as a set-off should be in the form of a personal judgment: *Hobbs v. Duff*, 23 Cal. 596.

9. Set-Off in Equity.—The jurisdiction of a court of equity in relation to set-offs is more extensive than that of common law courts; and when the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgment, a court of equity will decree a set-off: *Hobbs v. Duff*, 23 Cal. 596. Where the parties to two judgments are not the same, a court of common law jurisdiction cannot set off one against the other; but a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly: *Id.* A court of equity will not permit a *cestui qui trust*, who is insolvent, to enforce and collect, through his trustee, a judgment against a party who holds a just and valid demand against the *cestui qui trust*, which he has no means of enforcing or collecting if a set-off is denied: *Id.* An action brought in a court of equity to enforce a set-off of one judgment against another, is "an action upon a judgment or decree," within the meaning of section 17 of the Statute of Limitations, and may be brought at any time within five years of the date of the judgment or decree: *Id.*

10. Several Pleas.—Where there are several pleas to the country, with the plea of *nul tiel record*, and the parties go to trial, generally it will be presumed here that the issues were respectively decided by the proper tribunal: *Wall's Administrators v. Fife*, 37 Penn. 394.

11. Void Judgment.—Although the existence of a judgment, relied upon for the relief sought, is admitted by the answer, if the plaintiff proceeds to put it in evidence, and it is void upon its face, the court will treat it as forming no grounds for the plaintiff's action: *Ely v. Cook*, 2 Hilt. 406; S. C., 9 Abb. Pr. 366. So, where by his answer, in an action upon a judgment, the defendant puts in issue the existence of a regular, valid and legal judgment, any evidence tending to show the judgment illegal or void is competent. Hence, under such pleadings, after the plaintiff has produced a certified copy of the judgment record, the defendant may prove the statute, a rule of court (the judgment being a foreign judgment) showing the same to be irregular, and a certified copy of the record showing an order of that court vacating the judgment on the ground of such irregularity, although the vacation was made subsequent to the issue in the action. This is competent under a general denial, for it shows that no such judgment as the plaintiff has alleged in his complaint has in reality existed; that it never existed except in form, and was *ab initio* unlawful, irregular and void: *Kinsey v. Ford*, 38 Barb. 195.

12. When Debt Accrued.—This defense may be pleaded to an action on a judgment, founded on a debt existing when the bankrupt filed his petition, but which judgment was recovered before the discharge was granted, so that the defendant had no opportunity of pleading such discharge in the prior suit: *Dresser v. Brooks*, 3 Barb. 329; *Fox v. Woodruff*, 9 Id. 498; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Clark v. Rowling*, 3 N. Y. 216. Otherwise if the discharge might have been pleaded, but was not in the original action: *Stewart v. Green*, 11 Paige, 535.

*No. 650.*ii. *The Same—Invalidity of a Foreign Judgment.*

[TITLE.]

The defendant answers to the complaint:

I. That no summons or copy of the complaint, or either, was served upon him in the action mentioned in the complaint.

II. That he never appeared, in person or by attorney, in said action.

13. **Facts.**—Facts in opposition to the record of a judgment obtained in one state, cannot be alleged to contradict the judgment in an action brought upon it in another state. A judgment in one state is conclusive between the parties in another state: *Field v. Gibbs*, Pet. C. Ct. 155.

14. **Form.**—For form of defense, for invalidity of a foreign judgment, see *Long v. Long*, 1 Hill, 597; *Shumway v. Stillman*, 6 Wend. 447; *Starbuck v. Murray*, 5 Id. 148; see, also, *Fiske v. Anderson*, 12 Abb. Pr. 8; *Force v. Gower*, 23 How. Pr. 294. It is not enough merely to allege that his domicile was elsewhere: *Shumway v. Stillman*, 4 Cow. 294.

*No. 651.*iii. *The Same—Invalidity of Judgment against Non-Resident.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the action in which the supposed judgment against him was alleged to have been recovered arose upon an alleged contract.

II. That when the action was commenced, this defendant was a non-resident of the State of California, and a resident of Illinois.

III. That he never appeared in that action, and never was personally served in the State of California, or elsewhere, with summons therein.

IV. That no order for publication of the summons in that action was ever made [or state other facts showing failure to obtain jurisdiction].

*No. 652.*iv. *The Same—Fraud in Obtaining Judgment.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That, after the commencement of the action mentioned in the complaint, the said plaintiff came to this defendant,

and, with intent to deceive him and prevent him from defending it, falsely and fraudulently represented [here state false representations, detail the fraud fully and explicitly].

15. Fraud.—In an action on a foreign judgment, matters of defense alleging fraud in the obtaining of that judgment, even if conceded to be frivolous, cannot be held irrelevant, so as to be stricken out under section 152 of the Code: *Fasnach v. Stehn*, 5 Abb. Pr. (N. S.) 338. A plea of fraud in obtaining a judgment sued upon cannot be demurred to generally, because not showing the particulars of the fraud set up. Going to a matter of form, the demurrer should be special: *Christmas v. Russell*, 5 Wall. U. S. 290.

CHAPTER VIII.

ANSWERS ON THE MONEY COUNTS.

No. 653.

i. *Denial of Receipt.*

[TITLE.]

The defendant answers to the complaint:

That he has not received the money mentioned in the said complaint, nor any part thereof.

No. 654.

ii. *The Same—Accounting and Payment.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the day of, 187., at, he accounted with and paid over to the plaintiff all moneys received by him, up to that day, as such agent of the plaintiff.

1. Discharge in Bankruptcy.—In an action of *assumpsit*, for money had and received, the defendant pleaded a discharge in bankruptcy. The plaintiff replied that, in the proceedings of the defendant in obtaining his discharge, the defendant was guilty of fraud, and of the willful concealment of his property and rights of property. The defendant rejoined, traversing the fraud and the willful concealment, and concluding to the country: *Held*, on demurrer, that the rejoinder was bad; that the replication was bad also, in attempting to put in issue several distinct matters, and that the plea was good, notwithstanding that it contained no specific averments that the debt was one provable under the bankruptcy, or that the defendant had received a certificate of discharge, or that notice of a hearing was given to the creditors before the discharge was granted: *Weld v. Locke*, 18 N. H. 141.

2. General Denial.—An allegation in the complaint, that the defendants sold plaintiff's property for a certain sum, and that they "have had the use

of and interest upon said money, since it was received by the defendants for the plaintiff's use," is sufficiently controverted by a denial in defendants' answer that they sold the plaintiff's property, or that they received therefor any money whatever to the plaintiff's use: *Robinson v. Corn Exchange Ins. Co.*, 1 Abb. Pr. (N. S.) 186.

3. Insufficient Denial.—If the complaint avers that the defendant is indebted to the plaintiff in the sum of three thousand dollars gold coin, for so much money received by defendant for plaintiff's use, and the answer denies that the defendant received three thousand dollars in gold coin for plaintiff's use, it is only a denial of its receipt in gold coin, and does not raise an issue: *Leffingwell v. Griffing*, 31 Cal. 231.

No. 655.

iii. *For Money Lent—Denial of Loan.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff did not lend him the money mentioned in the complaint, nor any part thereof.

No. 656.

iv. *For Money Paid—Denial of Request by Defendant.*

[TITLE.]

The defendant answers to the complaint:

I. That he never requested the plaintiff to pay any money to A. B.

II. That he never promised to pay any money to the plaintiff, on account of any money paid to the said A. B., or at all.

4. Assignment of Claim.—To an action for money due, a plea on equitable grounds, that plaintiff assigned the debt to D., who notified defendant that assignment is still in force, that defendant is still liable to pay D., that the action is not brought for the benefit nor with the consent of D., that if the plaintiff recovered, the defendant would still be obliged to pay D. is good: *Jeffs v. Day*, Law Rep. 1 Q. B. 372. In an action to recover money alleged to be due from the defendant to the plaintiff, a defense alleging that a third person had given defendant notice that he was owner of such moneys and of any cause of action therefor, and demands payment to himself by virtue of an assignment from the plaintiff, is irrelevant: *Carpenter v. Bell*, 19 Abb. Pr. 258.

5. Failure of Consideration.—A county warrant drawn by the auditor, directing the treasurer to pay H. E. Co. nine hundred and sixty-five dollars, for services as county printer, was for a valuable consideration indorsed by H. E. Co. to F., and by F. transferred to plaintiff for nine hundred and sixty-five dollars, paid by the latter. The warrant was, in fact, illegal and valueless, and payment being for this reason refused by the treasurer, plaintiff instituted the present action against H. E. Co. and F. to recover back the

amount paid by him, setting up in the complaint the foregoing facts, and that defendants, at the time of their transfers, represented that the warrant was valid, and would be paid on presentation: *Held*, on demurrer, that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant: *Keller v. Hicks*, 22 Cal. 457.

6. General Denial.—A general averment that defendant does not owe the money sued for, nor any part thereof, is not sufficient: *Sappington v. Jeffries*, 15 Mo. 628.

7. Sufficient Plea.—Where an attorney claims a sum of money paid for another, to procure the passage of an act of the legislature, and alleges that the expenditure was made in good faith, was necessary, and was authorized by his principal, a reply that the expenditure was unlawful and corrupt, and was used and squandered to corrupt the legislature, and to exert upon it a secret, undue, and personal influence by lobbying; that the same was not necessary; that the act was honestly passed, and was not secured by corrupt means, is not demurrable: *Judah v. Vincennes University*, 23 Ind. 273.

CHAPTER IX.

ANSWER FOR SERVICES, WORK AND LABOR.

No. 657.

i. *Accounting and Payment.*

[TITLE.]

The defendant answers to the complaint:

1. For a first defense:

I. He denies each and every allegation in said complaint, except what is hereinafter admitted.

II. The defendant admits that said plaintiff did, at the request of defendant, enter into the service of the defendant as stated in the complaint, but alleges that he did account with said plaintiff on the day of, 187..., at, and that on the said accounting there was found due said plaintiff only the sum of dollars.

2. For a second defense defendant alleges, that after said accounting in the first defense alleged, to wit, on the day of, 187..., he paid to the plaintiff the said sum of dollars so found due upon said accounting, and the plaintiff received and accepted the same in full satisfaction of his said claim.

1. Contractor's Services.—When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy

two positions, of which the interests were in conflict, in defense of an action brought by him for services as superintendent: *Shaw v. Andrews & Hillyer*, 9 Cal. 73.

2. Corporation Work.—In an action against a municipal corporation for work and labor, an answer setting up that there was an appropriation made by law for such work, which has been exhausted, is insufficient, unless it appears clearly from the pleadings and the law referred to that the work was covered by the appropriation, and not by others contained in the same law: *Donovan v. Mayor of N. Y.*, 44 Barb. 180; 19 Abb. Pr. 58.

3. Counter-claims.—When the claim of plaintiff and counter-claim of defendant both arise out of the same contract, defendant may introduce evidence of unliquidated damages embraced in his counter-claim, unless the plaintiff come to the contract by assignment: *Stoddard v. Treadwell*, 26 Cal. 300. When an action is based upon a contract to pay a stipulated sum, and the answer sets up a counter-claim for damages for matters arising out of the same contract, the defendant cannot, on the trial, introduce evidence of any damages except those specially set up in the answer: *Id.*

4. Denial of Performance.—If the complaint is based on a written contract, by the terms of which plaintiff is to do certain things, and the complaint avers a faithful performance on his part, and the answer denies the performance, the defendant cannot, under this allegation and denial, introduce evidence of a counter-claim: *Stoddard v. Treadwell*, 26 Cal. 305.

5. Form.—For another form of answer, see *Rice v. O'Connor*, 10 Abb. Pr. 362. A plea merely of an account stated, though it avers a balance, and a promise of plaintiff to pay it, is bad, for it is a mere accord, without satisfaction: *Bump v. Phoenix*, 6 Hill, 308.

6. General Denial.—As to what may be proved under a general denial, in an action for services, work, and labor, see *Schermerhorn v. Van Allen*, 18 Barb. 29. In action on a *quantum meruit* not setting up a specific contract, under a general denial defendant may show that the work was unskillfully done, or was worth less than the amount claimed: *Raymond v. Richardson*, 4 E. D. Smith, 172; *Bellinger v. Craigue*, 31 Barb. 534; *Trimbull v. Stilwell*, 4 E. D. Smith, 512. On a specific contract it is otherwise: *Kendall v. Vallejo*, 1 Cal. 371; *Piercy v. Sabin*, 10 Cal. 22. In an action brought to recover for services rendered, the defendant, under an answer which denies the allegation in the complaint, and denies that he is indebted to the plaintiff, is at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed. He may, for example, under such denials, prove that he never incurred the debt, or that the services, either in whole or in part, were rendered as a gratuity, or that the plaintiff had himself fixed a less price for them than he claimed to recover, or that they were rendered upon the credit of some other person than the defendant, etc. So doing is not an attempt to show an extinguishment of the alleged indebtedness by payment, release, or otherwise, but to show that such indebtedness never existed: *Schermerhorn v. Van Allen*, 18 Barb. 29.

7. Professional Services.—Suit on a *quantum valebant* for professional services, the rule requiring new matter to be set up does not apply: *Bridges v. Paige*, 13 Cal. 640.

8. Salary of Clerk.—If a merchant employs one, by written contract, at a stated salary, to act as his chief clerk and managing agent for a stated time, and an action is brought by the clerk on the contract for wages, and the answer sets up a counter-claim for damages arising out of neglect of the clerk to attend to the business, the defendant has a right on the trial to introduce evidence of a loss of his profits and diminution of business caused by the clerk's neglect; and, to do this, he may ask a witness what amount of additional business would have been done if the clerk had attended to his business: *Stoddard v. Treadwell*, 26 Cal. 300. When the plaintiff's action arises out of contract, defendant may introduce evidence of any counter-claim arising out of contract existing at the commencement of the action, even though the contracts are not the same: *Id.*

9. Seaman's Wages.—In a libel for wages the allegations of hiring, voyage, etc., should be drawn accurately and with reasonable certainty; otherwise it may be excepted to. The most correct course is to state the facts, etc., in distinct articles, which is the usual course in admiralty proceedings: *Orne v. Townsend*, 4 Mason, 541. In a suit for wages, or for a share in a whaling voyage, if the defense sets up misconduct, there must be a special allegation of the facts, with due certainty of time, place, and other circumstances; otherwise the court will reject it. Loose allegations of general misconduct are insufficient: *Id.*; *Macomber v. Thompson*, 1 Sumn. 384; *Hart v. The "Otis," Crabbe*, 52. Where a new clause in the shipping articles is relied upon to repeal a claim for wages, it must be pleaded: *Heard v. Rogers*, 1 Sprague, 556; 7 Law Rep. (N. S.) 442. Where, in answer to a libel for wages, the claimants set up a discharge of the libelant in a foreign port by order of the consul, it is incumbent on them to set forth in their answer a state of facts justifying the discharge relied on, and to support the allegations by adequate proof: *The "Atlantic," Abb. Adm.* 451. An answer averring in general terms that a vessel was supplied with medicine chest according to law, is not of itself sufficient evidence to discharge a master from his liability for a physician's bill for attendance upon a sick seaman: *Freeman v. Baker*, Blatchf. & H. 372. Where a libel claims extra wages, in satisfaction of a short allowance of provisions, under section 9 of the act of July 20, 1790 (see U. S. Rev. Stat. at large, sec. 4568), the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute, or an exception will lie for insufficiency: *The "Elizabeth Frith," Blatchf. & H.* 195.

10. Violation of Contract.—Suit for services as agent of defendant under a contract. Defendant in answer sets up a violation of the contract on the part of the plaintiff, and also certain other matter amounting to a tort on his part, as conspiracy to have the property of defendant sold and bought in by him, circulating false reports that defendant was bankrupt, its affairs a swindle, etc.: *Held*, that this latter portion of the answer was properly stricken out, on motion of plaintiff: *Bates v. Sierra Nevada Lake Water and Mining Co.*, 18 Cal. 171.

CHAPTER X.

ANSWERS FOR USE AND OCCUPATION.

*No. 658.*i. *Denial of Use and Occupation.*

[TITLE.]

The defendant answers to the complaint:

That he did not occupy the premises as alleged, or at all.

*No. 659.*ii. *The Same—Denial of Hiring.*

[TITLE.]

The defendant answers to the complaint:

That he did not hire said premises of the plaintiff, as alleged, or in any manner, or at all.

1. Admission.—The plea of no rent in arrears admits the demise as laid in the avowry: *Alexander v. Harris*, 4 Cranch, 299; affirming 1 Cranch C. Ct. 243. An omission to join issue upon an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, cured by the verdict: *Dermott v. Wallach*, 1 Black, 96.

*No. 660.*iii. *The Same—Denial by Assignee.*

[TITLE.]

The defendant answers to the complaint:

That said [lessee] did not hire the premises from the defendant as alleged; and that no assignment of any such lease was made to, or accepted by, the defendant, as alleged; and that the defendant did not occupy the premises under the alleged lease, or under any lease.

2. Effect of Denial.—This will not admit evidence that, before the commencement of the action, he had parted with all interest in the lease and assignment: *Keteltas v. Maybee*, 1 Code R. (N. S.) 363. The occupation under a parol transfer might be sufficient to bind the defendant: *Carter v. Hammett*, 12 Barb. 253.

*No. 661.*iv. *The Same—Assignee's Assignment to Third Person.*

[TITLE.]

The defendant answers to the complaint:

That before the rent claimed in the complaint became due, and on or about the day of, 187., the

defendant assigned all his interest in said lease to one C. D., who then entered into possession, and so continued when said rent became due.

3. Assignment.—One of the Van Rensselaer leases was executed in 1799. It did not appear that rent was ever paid under it, and it was proved that rent had not been paid for twenty-two years: *Held*, that as the so-called lease was in fee, it was an assignment, and did not create the relation of landlord and tenant, and that the claim against the grantee on his covenant was barred: *Lyon v. Chase*, 51 Barb. 13; see *Cruger v. McClaughry*, 51 Barb. 642; *Van Rensselaer v. Barringer*, 39 N.Y. 9; *Hosford v. Ballard*, 39 N. Y. 147; see, also, *McLaren v. Benton*, 43 Cal. 468.

No. 662.

v. *The Same*—Eviction.

[TITLE.]

The defendant answers to the complaint:

That on the day of, 187., the plaintiff evicted him from the premises mentioned in the complaint, and has ever since kept him out of the possession thereof [or state the facts].

NOTE.—See *Vernam v. Smith*, 15 N. Y. 333; also, New York Code Commissioners' Book of Forms.

4. Forfeiture.—To work a forfeiture of a lease for non-payment of rent, a demand must be made for the precise sum due, on the premises, or wherever the rent is payable: *Gage v. Bates*, 40 Cal. 384; *O'Connor v. Kelly*, 41 Id. 452.

5. How Averred.—The eviction, to constitute a bar, must be averred to have taken place before the rent claimed fell due: *McCarty v. Hudsons*, 24 Wend. 291. It must be stated that the tenant was evicted or expelled from the premises, and kept out of possession until after the rent became due: *Vernam v. Smith*, 15 N.Y. 327.

6. Insufficient Defense.—In an action for rent, the complaint alleged that the letting was by an agreement in writing (not stated to be under seal), by which the plaintiff leased the premises, and the defendant agreed to pay the rent; but it did not allege that the defendant took possession. The answer set up two defenses: First, That although the plaintiff, at the time of making the lease, represented that he was the owner of the premises, and entitled to lease them, he was not, but that the premises were owned by third parties, "to whom the defendant was liable for the use and occupation thereof," and that no estate or interest vested in the defendant by the lease; Second, That the lease contained an agreement for quiet enjoyment; that shortly after defendant entered into possession, one W. brought an action of ejectment against him, and, after defense, recovered judgment against him for the possession, with costs; that W. made claim on the defendant for ~~same~~ profits in a sum equal to the rent claimed by the plaintiff, and defendant demanded judgment against the plaintiff for his damages by failure of the

plaintiff's title: *Held*, on demurrer to the answer, that since the defendant had voluntarily shown the fact of occupation, which the plaintiff had omitted to state, the rule precluding the tenant from denying his landlord's title, in an action for use and occupation, must be held to apply, and that the first defense was insufficient. If there was any other party who had an apparent claim for the use of the premises, the defendant should have sought a remedy by interpleader. That the second defense was insufficient, it showing no eviction: *Vernam v. Smith*, 15 N.Y. 327; see vol 1, p. 487.

7. Must be Specially Set up.—New matter in defense must be specially pleaded: *Coles v. Soulsby*, 21 Cal. 47; overruling *McLarren v. Spalding*, 2 Id. 410, where it was held that defendant might prove an eviction under a plea substantially of *nil debet*. In an action for rent, the defendant pleaded that the plaintiff, during the term, leased to another person and excluded the defendant from a part of the premises, in the use of which by the second lessee, large quantities of water, etc., were discharged on the defendants' part, and so damaged their goods that they were forced to quit the premises; and they claimed damages therefor in the action: *Held*, that the averments in the plea constituted eviction, and were not set off: *Dunwoody v. Raynor*, 52 Penn. 292.

No. 663.

vi. *The Same—Surrender.*

[TITLE.]

The defendant answers to the complaint:

That on the day of, 187., he surrendered to the plaintiff the premises mentioned in the complaint, and the plaintiff accepted the same.

No. 664.

vii. *The Same—A Defense to One Installment.*

[TITLE.]

The defendant answers to the complaint:

That to the last installment mentioned in the complaint, the defendant alleges, that after the alleged lease was made [or after the alleged letting], and before said installment became due, the plaintiff evicted him from the premises, and has ever since kept him out of the possession thereof.

CHAPTER XI.

ANSWERS UPON WRITTEN INSTRUMENTS FOR THE PAYMENT OF
MONEY ONLY.*No. 665.*i. *Bills of Exchange—Denial of Acceptance.*

[TITLE.]

The defendant answers to the complaint, and denies that he accepted the bill mentioned therein.

*No. 666.*ii. *The Same—That Acceptance was Unauthorized.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said bill was made without the authority or consent of these defendants, and out of the course of their regular business, and without consideration to them, accepted in their name by one A. B., fraudulently pretending to act under their authority, but who in fact had no authority to accept the same.

*No. 667.*iii. *The Same—Denial of Presentment.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the bill mentioned therein was never presented to A. B. as alleged, or at all.

NOTE.—See generally as to negotiable paper, bonds, bills of exchange, promissory notes, etc., *ante*, vol. 1, pp. 388 to 456; and Cal. Civil Code, secs. 3087 to 3164.

1. Presentment—Time.—The holder of a check did not present it for payment until twenty-five days after it was drawn, the drawee having failed meantime. The deposit with the drawee was made in funds which had become depreciated, but which did not appear to have been so at the time of the deposit. In a suit on the check as a bill of exchange, *held*, that the drawer was discharged: *Willets v. Paine*, 43 Ill. 433. Plaintiff took from her debtor's agent the agent's check for the amount of the debt, and did not present it for payment for four weeks. When presented it was dishonored, but there was a reasonable chance, though not a certainty, that it would have been paid if presented at once. The debtor, a week after the check was made, paid his agent part of the amount, the rest being in the agent's hands already. The agent absconded: *Held*, that the debtor was discharged: *Hoptias v. Ware*, L. R. 4 Exch. 268. The mere fact that one in a regular course of

business, in good faith, and for value, receives a check ten days after it was drawn and dated, does not subject him to the equities between the original parties to the same: *Ames v. Merriam*, 98 Mass. 294. As to how and when presentment must be made, see Cal. Civil Code, sec. 3131.

2. Place.—The failure to make presentment at the place named would not discharge a debt, but could only be pleaded in defense as to the question of costs and damages: *Montgomery v. Tutt*, 11 Cal. 307. A plea that a bill of exchange, on which the action is founded, was not drawn and accepted at the place alleged, is bad on demurrer: *Jones v. Heaton*, 1 McLean, 317.

No. 668.

iv. *The Same—That Acceptance was for Accommodation.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That he accepted the bill mentioned in the complaint for the accommodation of the plaintiff; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

3. Accommodation Indorser.—Accommodation indorser may set up any defense available to the maker, asserted *Sawyer v. Chambers*, 44 Barb. 42; Cal. Civ. Code, sec. 3120. But diversion of accommodation note from its original purpose is no defense in the mouth of the maker, unless injury to him is shown: *Corbitt v. Miller*, 43 Barb. 305. The want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument, does not exonerate him from liability thereon to an indorsee in good faith for a consideration: Cal. Civ. Code, sec. 3122; see also *Id.* secs 3123, 3124.

4. Authority, Denial of.—Where a bill in equity alleges that the defendant gave authority to A. to draw a bill of exchange, the answer, to completely negative such allegation, must deny the authority, and also any subsequent ratification. *Clark v. Van Reinsdyke*, 9 Cranch, 153.

5. Check—Set-off.—The drawee of a check certified as “good,” cannot set off a claim on the holder against the amount so transferred: *Brown v. Leckie*, 43 Ill. 497; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238; *Rounds v. Smith*. *Id.* 245.

6. Want of Consideration.—An answer in an action, by an indorser of a note, alleging that the plaintiff gave no value for the note, but took the same as security for an old debt, and showing that the plaintiff's indorser is indebted to the defendant, sets up no defense, and no evidence can be admitted under it. It is necessary to show that the indorser was so indebted at the time of the transfer to the plaintiff, as the latter takes the note free from subsequent equities: *Elwell v. Dodge*, 33 Barb, 336. For form of answer in such a case, see *Rodman v. Munson*, 13 Barb. 64; *Dubois v. Baker*, 40 Barb, 556; *Nichols v. Smith*, 42 Barb, 381. But partial failure of consideration cannot be alleged in bar: *Lewis v. McMillan*, 41 Barb, 420. The defense of want of consideration is personal between the parties to the original transaction. It cannot be set up against an independent liability of maker or indorser of negotiable paper given in payment: *Gillispie v. Torrence*,

25 N. Y. 306; *Delano v. Rawson*, 10 Bosw. 286; see, also, *Agwam Bank v. Egerton*, 10 Bosw. 669; see Cal. Civ. Code, sec. 3122. If a person delivers to his agent a promissory note, with the place for the name of the payee left blank, with directions to insert therein the name of a bank, and have the note discounted at the bank, and with the proceeds pay another note on which the principal is indebted, and the agent fill the blank with the name of the holder of such other note, and delivers it to him in payment of the other note, the agent violates his authority, and the note is without consideration and void in the hands of the payee: *Beeman v. Lovett*, 46 Cal. 387.

No. 669.

v. *The Same—Denial of Acceptance, Presentment, and Protest.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the bill of exchange mentioned in the complaint was not presented for acceptance nor accepted, as alleged, or at all, and that it was not presented for payment, nor was it protested for non-payment.

No. 670.

vi. *The Same—Controverting Excuse for Non-Presentment.*

[TITLE.]

The defendant answers to the complaint, and denies:

That any search was made, when the said bill of exchange became due, to discover the residence and person of the said....., at....., or elsewhere, or at all, in order that the said bill might be presented to the saidfor payment.

7. Unreasonable Delay.—When an unreasonable delay in the presentment of a check is meant to be relied on as a defense in an action against the drawer, such delay should be so averred as to raise a distinct issue in the answer: *Harbeck v. Craft*, 4 Duer, 122. By the Cal. Civil Code checks are declared to be bills of exchange, and subject to all its provisions concerning them, except that the drawer and indorser are exonerated by delay in presentment only to the extent of the injury which they suffer thereby; and an indorsee after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period: Secs. 3254, 3255.

No. 671.

vii. *The Same—Payment before Indorsement.*

[TITLE.]

The defendant answers to the complaint:

I. That after the bill mentioned in the complaint was due, to wit, on or after the....day of....., 187..., [date of maturity] and while said [drawer] was the holder thereof,

and before this action, the defendant satisfied and discharged the principal and interest [and damages] due on said bill, by payment to the said [drawer].

II. That said [drawer] indorsed said bill to the plaintiff after said payment, and after the maturity thereof.

. **Part Payment.**—See, as to consequences of omitting to set up an available defense of part payment, *Binck v. Wood*, 43 Barb. 315. As to defense of incautious payment of stolen, over-due note being available, see *Cothram v. Collins*, 29 How. Pr. 113. So, also, as to the defense that holder of note has received moneys applicable to its payment: *Burrall v. Jones*, 7 Bosw. 404.

No. 672.

i. *Promissory Note—Denial of Note.*

[TITLE]

The defendant answers to the complaint, and denies that he made, executed or delivered the note mentioned [or set forth] therein.

9. Bona Fide Holder.—The purchaser of a promissory note from the payee before it is due but after the payee has executed to the maker a release of the same, without knowledge of such release, is a *bona fide* holder, although he purchases for less than the face of the note and as a speculation, and although by the exercise of a little diligence he might have ascertained that the release had been given: *Schoen v. Houghton*, 50 Cal. 528. Where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorser taking it in good faith as collateral security for an antecedent debt for the payee and indorser, without other consideration, is a holder for value, and may recover thereon against the maker: *Grocers' Bank v. Penfield*, 69 N. Y. 502.

Bankruptcy. — If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser in trust for the plaintiff is good, and is not a departure from a declaration which alleges the note to be for value received: *Wilson v. Codman*, 3 Cranch, 193. The answer to a suit on a note set up defendant's discharge in insolvency: *Held*, that under section fifty-nine of the practice act, (Cal. Code C. P., sec. 456), it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described in defendant's schedule was matter of evidence, to be determined at the trial, by inspection of the record: *Hanscom v. Tower*, 17 Cal. 518.

Collateral Contract.—A contract made at the time of the execution and delivery of a promissory note, and which clearly refers to it, may be read in connection with the note as though it were incorporated into it; and in an action on the note by the payee the maker may prove that plaintiff has violated the contract; but the contract must be pleaded: *Goodwin v. Nickerson*, 51 Cal. 166.

12. Composition.—Where, to an action upon a promissory note, an agreement of composition between the debtor and his creditors, including

the plaintiff, is relied upon as a defense, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes: *Smith v. Owens*, 21 Cal. 11. In an action against the maker of a promissory note, he answered, that the plaintiff, with other creditors, signed a composition deed, agreeing to exchange the notes they had against the defendant, for other extended notes to be drawn by him; and it appeared on the trial, that the defendant called on the plaintiff and offered him the new notes which the agreement provided for, but the plaintiff refused to receive them; but that he had not the new notes drawn at the time of the offer; to complete such defense, the party must plead and prove, not only tender of the new notes, but also aver a readiness at all times to perform his part of the agreement, and must bring the new notes thus tendered into court on the trial: *Warburg v. Wilcox*, 7 Abb. Pr. 336.

13. Conclusion of Law.—In an action on a promissory note, where the complaint contains a copy of the same, a denial of indebtedness is no denial at all: *Kinney v. Osborne*, 14 Cal. 112; *Sneed v. Wister*, 8 Wheat. 690. A denial that the plaintiff is "owner and holder" of a note, is a denial of a conclusion of law; and an answer admitting the other facts, but denying this, raises no material issue: *Poorman v. Mills*, 35 Cal. 118; *Wedderspoon v. Rogers*, 32 Id. 569; but see *Oliver v. Depew*, 14 Iowa, 490; *McKnight v. Hunt*, 3 Duer, 615. So of an averment that the note in suit "was obtained from the said defendant by fraud, and is without consideration and void:" *McMurray v. Gifford*, 5 How. Pr. 14.

14. Counter-claim.—It is enough if the answer states a cause of action against the plaintiff and in favor of the defendant, arising out of contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action: *Allen v. Haskins*, 5 Duer, 332. In an action on a promissory note, by the payee, against one of two joint and several obligors, the defendant pleaded a demand, as a counter-claim, for damages for the unskillful construction of a mill by the plaintiff for the defendant, his co-obligor, and T., for the construction of which the note in suit was given in part payment: *Held*, that said counter-claim being for unliquidated damages, and in part a demand in favor of a stranger to the note and suit, it was unavailable as a defense to the action: *Hook v. White*, 36 Cal. 299; *King v. Wise*, 43 Id. 635. But where the claim of the defendant arose out of the same contract or transaction which is the subject of plaintiff's claim, it may be considered in the same action though the damages be unliquidated: Cal. Code C. P., sec. 438; *Stoddard v. Treadwell*, 26 Cal. 305; *Pattison v. Richards*, 22 Barb. 146; *Wheelock v. Pacific P. G. Co.*, 51 Cal. 226.

15. Counter-claim—Set-off.—Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the parties: *Payne v. Bensley*, 8 Cal. 260; affirmed in *Robinson v. Smith*, 14 Id. 94.

16. Covenant that Certain Sum is Due.—The assignee of a promissory note who purchases it in good faith before it falls due, without knowledge that payments have been made on it, and receives a covenant from the payee that the sum he pays for it is due, cannot maintain an action on the covenant if the amount is not due, for he sustains no loss, as the payor is liable to him for the face of the note: *Swall v. Clarke*, 51 Cal. 227.

17. Delivery.—To a complaint on a promissory note, where plaintiff alleged the making of the note by defendant, and delivery to plaintiff, and the answer denied the delivery to plaintiff: *Held*, that denial raised the issue on the making of the note so far as making includes delivery: *Russell v. Whipple*, 2 Cow. 536; *Sawyer v. Warner*, 15 Barb. 286.

18. Denial of Non-payment.—A specific denial of the allegation in the complaint that the note was not paid, and the answer stated that on, etc., the note had been paid, forms a good issue between the parties: *Van Giesen v. Van Giesen*, 12 Barb. 520; see *Farmers' etc. Bank v. Christensen*, 51 Cal. 571.

19. Duress.—A plea of duress by the maker of a note, as against the assignee, is bad, unless there be an averment of notice to the assignee: *McClintic v. Johnson*, 1 McLean, 414.

20. Former Judgment.—In an action against an indorser of a promissory note, a former verdict and judgment in favor of the defendant, in an action where the note was offered in evidence under a count on an account stated, is no bar: *Lindell v. Liggett*, 1 Mo. 432. Judgment against plaintiff, as holder of a note under one title, is no estoppel to a subsequent suit upon it under another: *Wheeler v. Ruckman*, 2 Abb. Pr. (N. S.) 186.

21. General Issue.—Where a declaration was upon a joint note, and the defendant pleaded that the note was the separate note of one of the defendants, and was given to and accepted by the plaintiff in full satisfaction of a debt: *Held*, that the plea was bad upon special demurrer, as amounting to the general issue: *Van Ness v. Forrest*, 8 Cranch, 30.

22. General Denial.—Suit on a promissory note made by defendants. The complaint, not verified, sets out the note, and avers assignment thereof by payee to plaintiff. Answer, general denial: *Held*, that the answer does not admit, but denies the assignment, and hence the plaintiff must prove it, and is not entitled to judgment on the pleadings: *Hastings v. Dollarhide*, 18 Cal. 390. That the plaintiff is not the owner and holder of the note in suit may be proved under a general denial of a complaint which alleges that he is: *Hull v. Wheeler*, 7 Abb. 411. But a denial that he is the owner and holder raises no material issue: *Wedderspoon v. Rogers*, 32 Cal. 569; *Poorman v. Mills*, 35 Id. 118; *Butterfield v. Macomber*, 22 How. Pr. 150; *Fleury v. Roget*, 5 Sandf. 646. But it is otherwise where no indorsement or delivery is averred: *McKnight v. Hunt*, 3 Duer, 615; *Metropolitan Bank v. Lord*, 4 Id. 630; 1 Abb. Pr. 185; *Hull v. Wheeler*, 7 Abb. Pr. 411. A complaint to subject to sale a contract for the sale and purchase of land held as collateral security for the payment of promissory notes, where the general denial is in a paragraph of the answer, alleging that the defendant was not a maker but merely an indorser of the notes, and did not assign the contract for the sale of the land to the plaintiff, either by delivery or indorsement, is demurrable: *Vaughn v. Cushing*, 23 Ind. 184.

23. Holder in Good Faith.—A negotiable note taken after maturity is taken subject to all the equities between maker and payee: *Vinton v. Crowe*, 4 Cal. 309. So with a certificate of deposit: *Coye v. Palmer*, 16 Cal. 158. An indorsee after maturity takes the same interest that the indorser had, and his claim is subject to the same defense: *Folsom v. Bartlett*, 2 Cal. 163. But he takes it free from all equities subsisting between the maker and any inter-

mediate holder: *Hayward v. Stearns*, 39 Id. 58. As a general rule, a *bona fide* holder of a negotiable instrument for a valuable consideration before the same is overdue or presumptively dishonored, and taken without notice of any facts which tend to impeach its validity as between antecedent parties thereto, may recover thereon, although as between such antecedent parties the legal validity of the instrument, or the title thereto may be successfully impeached: *Himmelman v. Hotaling*, 40 Id. 111. A purchaser of a negotiable note before due, and without notice of payments made on it, can collect the face of the note and interest: *Swall v. Clarke*, 51 Id. 227.

24. Information and Belief.—In a suit brought by a firm upon a note, an answer which denies any knowledge sufficient to form a belief as to whether plaintiffs comprise the firm to whose order the note was payable is erroneously stricken out: *Wales v. Chamblin*, 19 Mo. 500.

25. Injurious Diversion of Note.—An answer, setting up that the note was made as an accommodation note, does not show a misappropriation of the note sufficient to constitute a defense, by merely alleging that it was expected and intended that the plaintiff should have the proceeds of the note after it was negotiated, and that instead he had taken the note. The answer should show a diversion of the note injurious to the defendant: *Corbitt v. Miller*, 43 Barb. 305.

26. Insufficient Denials.—The complaint set out the note in *hæc verba*, and averred "that said note had not been paid, nor any part thereof," etc.; the answer thereto denied that said note had not been paid, and further denied "that there is due the plaintiff on said note any sum of money or anything:" *Held*, that said denials were of immaterial averments only; that said answer raised no issue, and was sham and irrelevant: *Hook v. White*, 36 Cal. 299. In an answer by the maker which admits the making and dishonor of the note, and notice of non-payment given to the indorsers, and merely denies the corporate character of the plaintiffs, the partnership of the indorsers and plaintiff's title to the note, is insufficient: 18 N. Y. 315; *Pres. of the Agawam Bank v. Edgerton*, 10 Bosw. 669. Where the pleadings are verified, and it is alleged in the complaint that the note sued on was assigned to plaintiff for a valuable consideration, the fact of the assignment is not put in issue by denying that it was in writing and for a valuable consideration: *Randolph v. Harris*, 28 Cal. 561.

27. Insufficient Answers.—Where the complaint contained two counts, each upon a promissory note, an answer referring simply to "the note mentioned in the complaint," was held bad for uncertainty: *Kneedler v. Sternbergh*, 10 How. Pr. 67. A declaration in *assumpsit* contained a special count on a due bill and the common counts. A special plea commenced thus: "Now comes the defendant, and defends the wrong and injury, etc., and says that after making and delivering said due bill, in said plaintiff's first count in said declaration mentioned, to wit, etc.," proceeding to allege payment of the bill: *Held*, that the plea did not purport to answer the whole allegation, but only the special count on the due bill: *Allen v. Bruesing*, 32 Ill. 505.

28. Lost Note.—Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to

time: *Castro v. Wetmore*, 16 Cal. 379. Where, in an action on a lost note, the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged, does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial: *Id.*

29. Note of Corporation.—A promissory note made by a corporation, payable to its acting trustees is void, being contrary to public policy: *Wilbur v. Lynde*, 49 Cal. 290.

30. Payment.—Where a note was taken in payment for another note, it must be averred that such note was taken in full satisfaction and payment: *Thomas v. McConnell*, 3 McLean, 381. In suit on a promissory note, an answer stating that defendant made two payments, the last of which extinguished the note, is sufficient: *Joy v. Cooley*, 19 Mo. 645. One who purchases a promissory note past due, but which has been paid before the purchase, takes it subject to the defense of payment: *Elgin v. Hill*, 27 Cal. 372.

31. Payment, what Constitutes.—The surrender of a note is *prima facie* evidence of payment: *Smith v. Harper*, 5 Cal. 329. But if surrendered by mistake, the maker is still liable for the balance unpaid: *Banks v. Marshall*, 23 Cal. 223. So, an assignment to the maker amounts to payment: *Gordon v. Wansey*, 21 Cal. 77. If a promissory note is assigned by the payee before maturity, payment to the assignor is no defense to an action brought by the assignee against the maker: *Morrill v. Morrill*, 26 Cal. 288; *Patterson v. Atherton*, 3 McLeane, 147. But it would be a defense if the payment were made before assignment and the assignee took with notice: *Morrill v. Morrill*, 26 Cal. 288; see Civil Code, sec. 3164, and *Id.* secs. 1697 to 1700.

32. Payment, what Does not Constitute.—Arrangement between the indorser and the holder of a note is not pleadable as a payment: *East Riv. B'k. v. Butterworth*, 45 Barb. 476. Nor can the indorser set up that the holder of a note past due has taken a fresh obligation from the maker merely as collateral security: *Taylor v. Allen*, 36 Barb. 294; see *Wright v. Storrs*, 32 N. Y. 691. A bill of sale made by the payee of a promissory note "of all debts, notes, and accounts of whatever nature due me," is not evidence of the payment of the note: *Morrill v. Morrill*, 26 Cal. 288. A plea to a suit brought by an assignee, that defendant paid amount of note to assignor before he had notice of assignment, cannot be sustained against assignee. It should aver that the payment was made before the note was assigned, or before it was due: *Patterson v. Atherton*, 3 McLean, 147.

33. Practice.—If judgment is rendered against A. upon several promissory notes signed by him, and one of the notes is also signed by B. and C. who are made parties defendant, but who are not served with process and do not appear, B. and C. may be brought into court to show cause why they should not be bound by the judgment, to the extent of the note which they signed, and they may be declared bound by it, A. having been served and having permitted judgment to go against him by default: *Sneath v. Griffin et al*, 48 Cal. 438.

34. Presentment.—As to presentment, and how made, apparent maturity and presumption of dishonor, see Cal. Civ. Code, secs. 3130 to 3136.

35. Several Answer.—Where the makers and several indorsers of a note are sued in one action, an answer by the makers will not inure as an answer

by the indorser, nor will the answer of one of several indorsers inure as an answer of the others: *Alfred v. Watkins*, 1 Edm. 369.

36. Several Defenses.—Defendant may deny that he made the note, and may also aver that at the time of the alleged making of the note he was an infant; although it is true that if he never made the note, it is quite immaterial whether he was an infant or not: *Mott v. Burnett*, 2 E. D. Smith, 50. He may also set up as a defense that no consideration was ever given for it, and as a second defense set forth the circumstances under which it was executed and came into the plaintiff's hands. It was held that the first branch of the answer must be interpreted by the second, and that so interpreted it was no defense: *Ryle v. Harington*, 4 Abb. Pr. 421.

37. Sham Answer.—Where a complaint, in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note, it is the denial of an immaterial averment: *Whitwell v. Thomas*, 9 Cal. 499. Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer, and for judgment. Granted. *Held*, that the ruling of the court was right; that under the fiftieth section of the Practice Act, (sec. 453, Cal. Code C. P.), "sham" answers and defenses are such as are good in form, but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out: *Gostorfs v. Taaffe*, 18 Cal. 385. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all: *Kinney v. Osborne*, 14 Cal. 112. So, an answer which simply denies a legal conclusion will be struck out as sham: *Wedderspoon v. Rogers*, 32 Cal. 569.

38. Special Indorsee.—In an action on a promissory note, by a special indorsee, against the maker, the plaintiff must prove at the trial the genuineness of the indorsements, although the defendant has not denied their genuineness under oath: *Grogan v. Ruckle*, 1 Cal. 158; reconsidered and affirmed in 18 Cal. 390. A general indorsement is one by which no indorsee is named: Cal. Civil Code, sec. 3112. A special indorsement specifies the indorsee: *Id.* sec. 3113. As to liability of an indorser "without recourse," see *Id.* sec. 3118.

39. Substitution of Parties.—On death of the defendant, in action on a promissory note, the substitution of administrator and continuance of the suit subjects the proceedings to such rules as are applicable for the collection of claims against the estate of a deceased person: *Myers v. Mott*, 29 Cal. 359; see Cal. Code C. P., sec. 1502.

40. Surety.—Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest: *Kritzer v. Mills*, 9 Cal. 21.

41. Tender.—That the maker of a note, payable at a particular place, was ready, at the time and place, to pay, is matter of affirmative defense: *Kendall v. Badger*, 1 McAll. 523; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Cald-*

well v. Cassidy, 8 Cow. 271; *Troy City Bank v. Grant*, Hill & D. Supp. 119; *Haxton v. Bishop*, 3 Wend. 13. So, also, of a bill of exchange, as against the acceptor thereof: *Foden v. Sharp*, 4 Johns. 183; *Green v. Goings*, 7 Barb. 652; 17 Mass. 389; *Gay v. Paine*, 5 How. Pr. 107; *Wallace v. McConnell*, 13 Pet. 136. It would seem that in New York it is essential to an answer setting up a tender to aver that the money has been actually brought into court: *Hill v. Place*, 5 Abb. Pr. (N. S.) 18.

42. Verification.—A copy of the note sued on being attached to and made a part of the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment: *Horn v. Volcano Water Co.*, 13 Cal. 62; Cal. Code C. P., sec. 447.

No. 673.

ii. Denial of Indorsement.

[TITLE.]

The defendant answers to the complaint:

That he did not indorse the note mentioned therein.

43. Denial of Indorsement.—In New York, a denial of indorsement and delivery of note by the payee to the plaintiff forms a material issue: *Sherman v. Bushnell*, 7 How. Pr. R. 171; 14 Barb. 393. In an action on a promissory note, an answer denying the indorsement of the note does not put in issue the partnership: *Anable v. Steam Engine Co.*, 16 Abb. Pr. 286. The action being to charge the defendants as indorsers, the allegation of their partnership is material: *Id.* A plea that the defendant who is sued as principal, indorsed the note as guarantor and not as principal, is good on demurrer: *Dibble v. Duncan*, 2 McLean, 553; compare *Janney v. Geiger*, 1 Cranch C. Ct. 547.

44. Indorsement, when not Denied.—A defendant is not required to deny under oath a matter of which he is not presumed to have any knowledge, and though the genuineness and due execution of a note is admitted if not specifically denied, yet it is otherwise with the indorsement where the defendant was not privy thereto, as the indorsement is alleged merely to show the deraignment of title to the instrument sued on: *Mahe v. Reynolds*, 38 Cal. 560; *Youngs v. Bell*, 4 Cal. 201.

45. Indorser, Liability of.—The contract of one who indorses a promissory note after it falls due, and as additional security to prevent legal proceedings being taken against the payee and indorser, is that of a guarantor, and, even if based on a valid consideration, is fatally defective, unless the writing express the consideration: *Crooks v. Tully*, 50 Cal. 254. A guarantor is entitled to notice of non-payment: *Id.*

46. Partnership—Insufficient Denial.—A complaint, stating a promissory note, whereby the maker promised to pay the defendant named, “doing business under the partnership name or firm of C. J. & Co.,” and that said note was “duly indorsed by said defendant by their said partnership name,” sufficiently avers the partnership; and an answer thereto denying “the indorsement in the complaint alleged,” does not put the partnership in issue. Hence, under such pleadings, evidence offered by one of the defendants, that he was never a member of the firm of C. J. & Co., is inadmissible: *Anable v. Conklin*, 25 N. Y. 470; affirming S. C., *sub nom. Anable v. Steam Engine Co.*, 16 Abb. Pr. 286.

*No. 674.*iii. *That Defendant Indorsed as Agent.*

[TITLE.]

The defendant answers to the complaint:

I. That he did not indorse the note mentioned therein, and that the said note was not protested for non-payment.

II. The defendant alleges that the following is a true copy of the promissory note made by the said firm of B. & Co., and on which this action is brought: [Copy of note and indorsement, with addition of "Treasurer" to defendant's signature.]

III. That at the time of the making and indorsement of said note, this defendant was the treasurer of the Company, at, a foreign corporation, duly incorporated by and under the laws of the State of; and that he was authorized by them to receive the said note, and to indorse the same to the plaintiffs, as such treasurer, of all which facts the plaintiffs had notice.

IV. That said corporation was, at the time of said indorsement, indebted to the plaintiffs to the amount of dollars, for [state what]; and said note was received by him as such treasurer, and not in his individual capacity, and was received by the plaintiffs as an obligation of the said corporation, on account of said precedent debt due to them from the said corporation, and for and on account of no other consideration whatever, and that the defendant received no consideration therefor.

47. Form.—This form is from Abbotts' Forms, No. 833, and is in substance the answer in *Babcock v. Beman*, 11 N. Y. 200. The defendant should aver and prove the authority under which he acted, and show that the plaintiffs have a right of action against some other person: *White v. Skinner*, 13 Johns. 307.

*No. 675.*iv. *Denial of Presentment.*

[TITLE.]

The defendant answers to the complaint:

That the bill mentioned therein was never presented to A. B., etc.

48. Controverting Presentment.—That the maker of the note payable at a particular place was ready at the time and place to pay, is matter of affirmative defense: *Kendall v. Badger*, 1 McAll. 523. A denial of the allegation of presentment and non-payment of note is sufficient: *Dickenson v. Kimball*, 1 Code R. 49.

49. Waiver.—If the indorser of a promissory note, after it falls due promises to pay the same, with a knowledge that the holder has failed to make demand of payment and give notice of non-payment, the promise dispenses with the necessity of demand and notice: *Curtis v. Sprague*, 51 Cal. 239; *Bryant v. Wilcox*, 49 Id. 47.

No. 676.

v. *Denial of Notice of Dishonor.*

[TITLE.]

The defendant answers to the complaint:

That notice of dishonor of the note [or bill of exchange] mentioned in the complaint, was not given to him.

50. Notice of Protest.—The denial in a verified answer of the indorsers, in action on a promissory note, that notice of protest was received by them is not a sufficient denial that notice was given. As to form of notice, service, etc., see Cal. Civil Code, sec. 3142 *et seq.*; *Edgerton v. Smith*, 3 Duer, 614; *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer, 207; compare *Burrall v. De Groot*, 5 Id. 379, 382.

No. 677.

vi. *Alteration of the Instrument.*

[TITLE.]

The defendant answers to the complaint:

That after the making [or acceptance] and issue of said note [or bill], and before this action, the same was materially altered, without the consent of the defendant, by adding the signature of A. B. as a joint maker thereof [or by cutting off the signature of A. B., who was a joint maker thereof, or by adding the words, “payable at,” or otherwise, as the case may be].

51. Alteration.—An answer to a suit on a promissory note by the assignee, which sets up as one defense: First, That the note was made payable to order, and was afterwards fraudulently altered by inserting the word “bearer;” in lieu of the word “order;” Second, That the defendant paid the note before assignment to plaintiff after maturity, etc.: *Held*, not fatally defective: *Sherman v. Rollberg*, 11 Cal. 38. Where an answer contains an allegation of alteration of an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff: *Humphreys v. Crane*, 5 Cal. 173. For form of answer for mistake in amount of note, see *Seeley v. Engell*, 13 N. Y. 542.

No. 678.

vii. *Usury as a Defense upon a Note.*

[TITLE.]

The defendant answers to the complaint:

I. That the note mentioned therein was given to the plaintiff in pursuance of a mutual agreement, between the plaintiff and defendant, that the plaintiff should lend the

defendant money, at the rate of [ten] per centum per annum.

II. That the defendant received from the plaintiff dollars only, as consideration for the said note, the plaintiff retaining dollars, as interest thereon.

NOTE.—In California, we have no usury law.

52. Foreign Usury Laws.—To set up the defense that a foreign contract is void, by foreign usury laws, defendant should first state what those laws were at the time of the transaction, and then set out the facts which rendered the securities void, according to those laws: *Curtis v. Masten*, 11 Paige, 15. A general allegation of usury is not enough; the answer should state what the usurious agreement was, and between whom it was made, and the amount of the usury: *Manning v. Tyler*, 21 N. Y. 567; *Griggs v. Howe*, 31 Barb. 100; as well as the amount of the loan: *Smalley v. Doughty*, 6 Bosw. 66. The rate should be stated with definiteness: *Dagal v. Simmons*, 23 N. Y. 491.

53. How Alleged.—It is not necessary to allege in terms that the transaction was “usurious” or “corrupt,” if facts which amount to usury are stated with sufficient certainty: *Miller v. Schuyler*, 20 N. Y. 522. For a form of answer of usury, in the transfer of an accommodation note, see *Cathin v. Gunter*, 11 N. Y. 368; approved in *Manning v. Tyler*, 21 N. Y. 567. An answer pleading usury in the discount by the plaintiff, should show that the note never had any valid existence as a contract or promise to pay at the time it was discounted by the plaintiff: *Burrall v. Bowen*, 21 How. Pr. 378.

54. Insufficient Allegation.—An allegation that one received goods “without paying any consideration therefor,” is not sustained by proof that the advances made by him were at a usurious rate of interest: *Williams v. Birch*, 6 Bosw. 299.

55. Must be Specially Pleaded.—Usury is a defense which cannot be made available on the trial of a cause, unless it is specially pleaded: *Morford v. Davis*, 28 N. Y. 481. For a sufficient statement of such a defense, see *Butterworth v. Pecare*, 8 Bosw. 671. Usury can no longer be proved under a denial of making the contract. Evidence of it in the transfer of a note, if not alleged in the pleadings, is inadmissible, even as a circumstance to show that the holder did not take the note in good faith: *Scott v. Johnson*, 5 Bosw. 213.

56. Usury as a Defense.—To a complaint on a note, the answer of an indorser alleged usury, and demanded judgment that his name be cancelled and discharged from the note: Held, that the answer was not to be deemed as setting up a counter-claim, so that failure to reply admitted its allegations. When the facts alleged may possibly constitute a counter-claim, but are such as always constitute a flat bar at law to the action, they should be deemed to be set up as a defense merely, unless the answer expressly states that they are set up by way of counter-claim. To preclude a plaintiff from recovery, on the idea that he has admitted the allegations of such an answer to be true by omitting to reply to it, when the same allegations viewed merely as a defense would be put at issue by the code, would operate as a surprise in all actions in which the defense of usury is interposed. *Burrall v. De Groot*, 5 Duer, 379; and see *Gildersleeve v. Mahony*, 5 Id. 383, 385.

*No. 679.*viii. *That the Note was for Goods Sold by Means of Deceit.*

[TITLE.]

The defendant answers to the complaint:

I. [Allege sale as in case of an action for damages for deceit. See ante, Forms Nos. 506, 508.]

II. That said note was given to the plaintiff without any other consideration than said [sale].

That immediately on discovering said fraud, the defendant rescinded said [contract], and tendered to the plaintiff all that he had received under said contract, upon condition of his returning said note, which the plaintiff refused to do.

57. Deceit.—It is no defense to a note given by one partner to the other for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note: *Case v. Maxey*, 6 Cal. 276. When such a defense was set up in the answer, in an action on the note: Held, that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out: *Id.* The defense of false and fraudulent representation as to value is not available, unless the seller knew or had reason to believe that the representations were untrue: *Davidson v. Jordan*, 47 Id. 351.

*No. 680.*ix. *Illegal Interest in Note.*

[TITLE.]

The defendant answers to the complaint:

As to the sum ofdollars, parcel of said sum ofdollars, in said complaint demanded, the said defendant admits that he owes the said sum ofdollars to the said plaintiff; but as to the sum ofdollars, the residue of the said sum ofdollars, the said defendant says that the said promissory note in the complaint mentioned was given by the said defendant to the said plaintiff for the loan ofdollars foryears, and no more; and that the said sum ofdollars was included in said note, as interest on the said sum ofdollars for the said term ofyears, at the rate ofper cent. per annum.

58. Form.—This form is applicable under a statute which forfeits only the usurious interest: From Nash's Ohio Pl. and Pr. 311.

*No. 681.**x. Fraud—Note Procured by Fraud.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time the note in the complaint set forth was made, he was indebted to one E. F., by book account, in the sum of dollars.

II. That the plaintiff at the time falsely and fraudulently represented to the defendant that he was the owner and assignee of said account and indebtedness, and thereby, and without any consideration whatever, induced the defendant to make said note to him in satisfaction and discharge of said account.

III. That the said representations were false, and that the plaintiff never was the owner or assignee of said account, nor had he any beneficial interest in the same.

IV. That the defendant was misled by said false representations. [Or, that the belief of the defendant in the truth of said representations induced him to make said note.]

59. Fraud.—In an action on a negotiable note, by the payee, against the maker, a plea which amounts to an averment of fraud on the part of both parties and a third person, with a view to defraud the creditors of the latter, is bad, as it tenders an issue foreign to the case: *Moore v. Thompson*, 6 Mo. 353. In such case the court will refuse to enforce payment, but will leave the parties as they are, no matter which party first exposes the fraud: *Ager v. Duncan*, 50 Cal. 325. Where the defense set up is that defendant executed said note as the consideration for a deed from plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein, the defendant, if he would avoid payment, must offer to surrender the deed to be cancelled, so that both parties could have been remitted to their original rights: *Tissot v. Throckmorton*, 6 Cal. 471. Where fraud is set up as a defense, the answer must aver that the defendant has done all in his power to restore the plaintiff to his former condition, or the fact cannot be proved: *Devendorf v. Beardsley*, 23 Barb. 656.

60. Fraud, how Alleged.—In defense to an action on a promissory note, it is not sufficient to plead, in general terms, want of consideration, and that the note was obtained by fraud; the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud: *Gushee v. Leavitt*, 5 Cal. 160. Fraud cannot be alleged generally: *McMurray v. Gifford*, 5 How. Pr. 14; *Anderson v. Johnson*, 3 Sandf. 1. To avoid the contract sued on, by an answer setting up false representations, it must be alleged that the plaintiff knew the representations were false, and that the defendant was misled thereby, or that his belief in their truth induced him to enter into the contract: *Van de Sande v. Hall*, 13 How. Pr.

458; *Palmer v. Smedley*, 18 Id. 321. For substance of a sufficient answer, setting up that the defendant was induced to make the contract sued on by the fraud of a broker who was the plaintiff's agent, see *Cassard v. Hinman*, 6 Bosw. 8.

61. Must be Specially Plead.—Fraud cannot be proved on the trial, if not alleged in the pleadings: *Ogden v. Raymond*, 5 Bosw. 16. To a complaint in the usual form upon a promissory note, an answer was filed, admitting the signing of the note, but averring that it was made, not on account of an indebtedness existing between the parties, but for the purpose of being used as collateral security for a debt due to a third person from the maker and payee jointly; that the joint debt was subsequently paid, and that the note having thus become *functus officio*, should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff: *Held*, that these allegations were not new matter, which, under the system of replication then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations: *Goddard v. Fulton*, 21 Cal. 430.

62. Note for Mining Stock.—If a defendant would resist the payment of a promissory note given for mining stock, on the ground that the seller made fraudulent representations as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract: *Gifford v. Carvill*, 29 Cal. 589; see 47 Id. 351.

No. 682.

xi. *That the Note was for Goods Sold on a False Warranty.*

[TITLE]

The defendant answers to the complaint:

I. That the defendant made, executed, and delivered the note mentioned in the complaint for and on account of certain goods [describe them] theretofore furnished by the plaintiff to him, the defendant, under a representation and warranty by the plaintiff, at the time of so furnishing them made to the defendant, that the said goods were [state facts relative to the warranty].

II. That the defendant then accepted and purchased said goods for the purpose of [state purpose], trusting in the said representation and warranty of the plaintiff, all of which the plaintiff then well knew.

III. That the same were not the kind of goods purchased, nor such as they were so warranted to be by the plaintiff as aforesaid, in this [state wherein], nor would they answer the purpose designated.

IV. That the defendant upon the discovery that the said

goods were not such as they were warranted to be, as aforesaid, returned [or offered to return] the same to the plaintiff, and demanded of the plaintiff that he return said note to the defendant. [If plaintiff received the goods back, so state; if he refused, allege that the goods are still held by the defendant for the plaintiff, of all which the plaintiff had notice.]

63. Form of Plea.—The nature of the defect should be stated: *Castles v. Woodhouse*, 1 Code R. 71; and the extent of the depreciation caused by it, as nearly as may be: *Defendorf v. Gage*, 7 Barb. 18. In an action against the maker of a note, the defendant answered, setting up a failure of consideration, in that the goods sold by the plaintiff, in payment for which the note was given, were not of the quality warranted, and claimed damages for the breach of warranty: *Held*, that the defense set up by the answer did not constitute a counter-claim, and required no reply: *Nichols v. Boerum*, 6 Abb. Pr. 290. A plea to an action on a note given for merchandise, which avers that the goods purchased are of no value to the defendant, is not good. It should show that the goods, if they had been returned to the plaintiff would have been valueless: *Christy v. Cummins*, 3 McLean, 386. Where defendants gave their note for a tract of land as a part of the public domain, defendants might plead the fact in an action on the notes: *Scudder v. Andrews*, 2 McLean, 464.

No. 683.

xii. *Recoupment for Breach of Warranty.*

[TITLE.]

The defendant answers to the complaint:

I. That the said note was not, before it became due, transferred and delivered to the plaintiff for value.

II. That the said note was made and delivered by the defendant to one A. B., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of cigars, which were sold by sample to the defendant at that time by said A. B., as such agent.

III. That when said cigars were delivered to this defendant, they did not correspond with the samples, and were not worth more than dollars.

IV. That as soon as the defendant learned the character of said cigars, he offered to said A. B., as such agent, to return them, which he is still ready and willing to do.

Wherefore the defendant claims to recoup.....dollars, his damages in this behalf, from the amount of the said note.

FORM.—This form, from “Abbotts’ Forms,” No. 870, is in substance from *Allen v. Haskins*, 5 Duer, 332.

64. Counter-claim—Recoupment.—In an action on a promissory note for one hundred and twenty dollars, the answer of the defendant, the maker, stated that the note was given on the purchase of goods; that the goods were not of the quality warranted, and that upon the discovery of their defects he offered to return them, and he claimed damages in the sum of one hundred dollars, to be recouped from the amount of the note: *Held*, on demurrer to the answer, that the answer was not insufficient because it did not present a defense to the whole demand of the plaintiff. If there was a breach of warranty, the defendant would have a cause of action against the plaintiff: *Allen v. Haskins*, 5 Duer, 332; see also *Beirne v. Dord*, 1 Seld. 95; *Hargous v. Stone*, 1 Id. 72. A counter-claim to a set-off may be proved without pleading, where there has been no opportunity to plead it: *Hart v. Cooper*, 47 Cal. 77.

No. 684.

xiii. *That the Note was for Accommodation, and was Misapplied.*

[TITLE.]

The defendant answers to the complaint:

I. That the note mentioned and described in the complaint was given by this defendant to [the payee] therein named, without any other consideration than is hereinafter stated.

II. That theretofore this defendant had loaned his promissory note for.....dollars, dated on the.....day of, 187., to said [payee], without consideration, and solely for the accommodation of said [payee], and upon his promise to take up and pay the same at maturity.

III. That the said note fell due on the.....day of, 187., and that, at the request of said [payee], this defendant then gave him the note in suit, for the special purpose of enabling him therewith to take up and renew said first note of.....dollars, he paying the balance, and upon the agreement with him that it should be so used, and not otherwise.

IV. That the plaintiff having a claim then over-due against the said [payee], he, said [payee], wrongfully diverted said note from the purpose for which it was given, and fraudulently misapplied the same, by giving it to the plaintiff as collateral to secure the payment of said claim.

V. That the plaintiff is not a *bona fide* holder of the note in suit for a valuable consideration; but received the same with notice of the foregoing facts, and as collateral to se-

cure the payment of an antecedent debt, and without paying any consideration therefor.

VI. This defendant denies each and every allegation of the complaint inconsistent with the foregoing statement.

65. Form.—This form is from Abbotts' Forms, No. 864. It constitutes *prima facie* a good defense. It is not necessary to allege that defendant has been injured by the diversion. It is incumbent upon the plaintiff to show that he has not been injured: *Rochester v. Taylor*, 23 Barb. 18.

66. Assignment before Maturity.—If the complaint, in an action by the assignee of a promissory note against the maker, avers that the note was assigned to the plaintiff for a valuable consideration, before maturity, and is sworn to, an answer which denies that the note was for a valuable consideration indorsed and delivered by the payee to the plaintiff before maturity, or at any other time, does not put in issue the fact of the assignment before maturity; but if it puts in issue anything, it is only the allegation that the assignment was made for a valuable consideration: *Morrill v. Morrill*, 26 Cal. 288. In an action on a note, a plea that the note has been assigned should be supported by some proofs that the beneficial interest is still in the assignee. Assignments are often made to banks for the mere purpose of collection: *Conant v. Wills*, 1 McLean, 427; compare *Hartshorn v. Green*, 1 Minn. 92. Commercial paper transferred before maturity as collateral security for a pre-existing debt is not subject to the defenses of payor against payee: *Payne v. Bensley*, 8 Cal. 260; *Naglee v. Lyman*, 14 Cal. 450.

67. Real Party.—That plaintiff is not the holder and owner of a note, nor the real party in interest, should be specially alleged, showing how and why he is not the real party in interest: *Arthur v. Beales*, 1 Ex. 608; *Fraser v. Welsh*, 8 M. & W. 629; *De Santes v. Searle*, 11 How. Pr. 477. It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff: *Gushee v. Leavitt*, 5 Cal. 160. In an action upon a promissory note, if it appears that the legal title is wholly in the plaintiff, it is error for the court to permit another to be joined with him as plaintiff, although such other may have an equitable right to a part of the proceeds of the note when collected: *Curtis v. Sprague*, 51 Id. 239.

68. Want of Consideration.—A plea of want of consideration, in an action on a bill of exchange, must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned: *Boden v. Wright*, 12 C. B. 445. Under an answer merely averring that the note was void for want of consideration, and that the plaintiffs are not *bona fide* holders, the defense of usury, though it appears by the evidence on the trial, is not available: *Mechanics' Bank of Williamsburgh v. Foster*, 44 Barb. 87; S. C., 19 Abb. Pr. 47; and 29 How. Pr. 408. A partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase-money of land: *Reese v. Gordon*, 19 Cal. 147.

ANSWERS—SUBDIVISION SECOND.

On Breaches of Contracts.

CHAPTER I.

ON BUILDING CONTRACTS.

No. 685.

i. Work not Finished, and Architect's Certificate not Obtained.

[TITLE.]

The defendant answers to the complaint:

I. That the said work was not completed in a good and workmanlike manner, on or before the day limited therefor, in the contract set forth in the complaint; but on the contrary, the said work on that day, and from thence to the commencement of this action, was, and still is, incomplete and unfinished.

II. That no certificate from the said architect, that the said work had been completed to his satisfaction, was obtained by the plaintiff before this action.

1. **Counter-claims.**—Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant having, at the date of the contract, leased the building to responsible tenants, the lease to take effect from the time named in the contract for its completion: *Held*, that defendant cannot offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building: *McGinley v. Hardy*, 18 Cal. 115. The architect's certificate is for the benefit of the owner, and may be waived by him, at his option, and other proofs of the required fact accepted: *Blethen v. Blake*, 44 Cal. 117. If a contract provides that the contractor shall not deviate from the written contract, nor receive pay for extra work, unless a written order for the same is signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer, even if the contract declares that the engineer may direct alterations in and additions to the work: *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417. As to time in building contracts, see *Front St. M. & O. R. R. Co. v. Butler*, Id. 574.

2. **Special Plea.**—That the work was done in an unworkmanlike manner must be specially set up in the answer: *Kendall v. Vallejo*, 1 Cal. 371; *People v. Sabin*, 10 Id. 22; *Laraway v. Perkins*, 10 N. Y. 371.

CHAPTER II.

ON CHARTER PARTIES.

*No. 686.**Denial of Offer to Perform.*

[TITLE.]

The defendant answers to the complaint:

I. That at the time fixed by the agreement referred to in the complaint, the plaintiff was not ready or willing, or in a condition, to receive the merchandise mentioned in the said agreement [or any part thereof].

1. **Note.**—That no demurrage can be recovered by an owner for a detention occasioned either by the misconduct of the master, for which the owner alone was answerable, or to avoid danger, and not by any misconduct or any breach of covenant by the charterer: *Hoe v. Groverman*, 1 Cranch, 214.

CHAPTER III.

ON COVENANTS.

*No. 687.*i. *Denial of Covenant.*

[TITLE.]

The defendant answers to the complaint:

That he did not covenant or agree with the plaintiff as alleged, or at all.

1. **Non Est Factum.**—Under a plea of *non est factum* to an action of covenant, it is competent to show a variance between the deed offered in evidence and that declared on: *Treat v. Brush*, 11 Mo. 310. What defenses are admissible in actions of covenants, see *Wilder v. Adams*, 2 Woodb. & M. 329; *United States v. Clarke*, Hempst. 315; *Gill v. Patton*, 1 Cranch C. Ct. 143; *Wise v. Resler*, 2 Id. 182; *Scott v. Lunt*, 3 Id. 285; *Kurtz v. Becker*, 5 Id. 671.

*No. 688.*ii. *The Same—Denial of Breach.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the defendant duly performed said covenant [or all the conditions of said contract] on his part; and [here state performance, pursuing the words of the covenant, if it be in the affirmative; and stating particular acts, if it be in the

alternative, in any case where this can be done without too great prolixity].

2. Assignment.—A plea alleging an assignment of a covenant to pay rent by the plaintiff to a third person, should aver the form of the assignment, whether verbal or in writing: *Thomas v. Cox*, 6 Mo. 506.

3. Counter-claim.—In an action at law to recover damages for failure to comply with a covenant to indemnify plaintiff against liabilities, the defendant cannot set up, as a counter-claim, demands which were matters of partnership between the parties: *Haskell v. Moore*, 29 Cal. 437.

4. Performance.—Where the plaintiff has assigned a particular breach, a general plea of performance, pursuing the words of the contract, is bad: *Bradley v. Osterhoudt*, 13 Johns. 404; *Beach v. Barrons*, 13 Barb. 305. Performance must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled—*e. g.*, the defendant should aver not that he sold, but that he conveyed, setting forth the nature of the conveyance: *Thomas v. Van Ness*, 4 Wend. 549. In Pennsylvania, the defendant may plead performance, with leave to give in evidence anything which amounts to a legal defense, and may introduce such evidence without notice of the real defense he intends to set up: *Webster v. Warren*, 2 Wash. C. Ct. 456; compare *Gill v. Patton*, 1 Cranch C. Ct. 143. Where the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed immediately, or, at most, within a reasonable time: *Brennan v. Ford*, 46 Cal. 7.

CHAPTER IV.

ON EMPLOYMENT.

No. 689.

i. *Denial of Contract.*

[TITLE.]

The defendant answers to the complaint, and denies:
That he agreed with the plaintiff as alleged, or at all.

No. 690.

ii. *The Same—Denial of Plaintiff's Performance.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [here state breach].

*No. 691.*iii. *The Same—Performance by Defendant.*

[TITLE.]

The defendant answers to the complaint:

That he made the said [articles] furniture, and on the day of, 187 ., delivered the same to the plaintiff, in every respect as agreed.

*No. 692.*iv. *The Same—Excuse for Non-Performance.*

[TITLE.]

The defendant answers to the complaint:

I. That at the time of making said agreement, the plaintiffs agreed with this defendant, that, in consideration that he would deliver to them, at their store in [state what], they, the said plaintiffs, would pay this defendant [state amount, and when and where to be paid].

II. That the said plaintiffs failed and refused to pay the same on the delivery of said articles at said store.

1. Master and Servant.—To an action for breach of an indenture of apprenticeship, the defendant, the apprentice's father, pleaded that the apprentice "was and is prevented by act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all said term." *Held*, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action: *Boast v. Firth*, Law Rep. 4 C. P. 1.

CHAPTER V.

ON INDEMNITY.

*No. 693.**Denial of Performance.*

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff performed the conditions, or any of the conditions, on his part in the said agreement referred to in the complaint.

II. [Allege negligence in defending the action for which he was sued, and want of notice to the defendant of the pendency of the same.]

1. Indemnity. — As to indemnity by depositor, see Cal. Civ. Code, sec. 1833. By employer: Id. sec. 1969-1971; of trustee: Id. sec. 2273; of partner: Id. sec. 2412; and in general, see Id. sec. 2772-2781.

2. Liability. — Where, upon the dissolution of two copartnerships, the defendant executed an agreement to indemnify and keep L. [one of the partners] "harmless from and against all debts due and owing from the late firms:" *Held*, that under this clause of the agreement the covenantor was not liable until something had been paid by L.: 7 Wend. 499; *Wright v. Whiting*, 40 Barb. 235.

3. Negligent Defense. — Where one holding an indemnity against all actions and all damage by reason of a certain claim, is sued thereon, and, having a probably ample defense, undertakes to defend it without calling on the obligor in the indemnity, and omits to set up such defense, and by utter neglect, fails in the suit, he cannot afterwards enforce the indemnity: *Bridgeport Fire and Marine Ins. Co. v. Wilson*, 7 Bosw. 427.

4. Release. — Defendant made a valid agreement with three partners not to do business in a certain place; two of said partners sold out to the third, and left said place; said third resold the business to defendant, and released said agreement: *Held*, that the other two partners could not sue for a breach, as the agreement was incident only to the business: *Gompers v. Rochester*, 56 Penn. 194.

CHAPTER VI.

ON PROMISE OF MARRIAGE.

No. 694.

i. *Denial of Promise.*

[TITLE.]

The defendant answers to the complaint, that he never promised to marry the plaintiff.

No. 695.

ii. *Denial of Plaintiff's Readiness and Offer to Marry.*

[TITLE.]

The defendant answers to the complaint, and denies that the plaintiff has been ready or willing to marry the defendant, or that she ever did offer to marry him as alleged, or at all.

No. 696.

iii. *Denial of Breach.*

[TITLE.]

The defendant answers to the complaint, and denies:

That the defendant has refused to marry the plaintiff, but avers that on the.....day of....., 187., and ever

since, he has been ready and willing to marry her, but at the date above mentioned, and at all times since then, the plaintiff has refused to marry this defendant.

No. 697.

iv. *That Plaintiff was of Bad Character.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned as the time of said supposed promise, the plaintiff was unchaste.

II. That defendant was ignorant thereof at that time.

III. That upon being informed thereof, he refused to marry the plaintiff.

No. 698.

v. *Another Form.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned as the time of said supposed promise, and on the..... day of....., 187., at, the plaintiff, without the connivance of the defendant, had carnal connection with one C. D.

II. That upon being informed thereof, he refused to marry the plaintiff.

1. Misconduct.—See, as to the necessity of interposing a special plea of misconduct on the part of the plaintiff, when relied upon as a defense: *Button v. McCauley*, 38 Barb. 413. That neither party to a contract to marry is bound by a promise made in ignorance of the other's want of chastity: See Cal. Civ. Code, sec. 62. But if this defense is not established by proof upon the trial, it should be considered by the jury in aggravation of damages: *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 651. See, also, as to this defense: *Fes Storck v. Griffin*, 77 Pa. St. 504. Seduction, if alleged in the complaint, may be shown to enhance damages, but not otherwise: *Leavitt v. Cutler*, 37 Wis. 46; *Cates v. McKinney*, 48 Ind. 562; 17 Am. Rep. 768.

2. Other Defenses.—An agreement by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy and void: *Noice v. Brown*, 38 N. J. L. 228. A man may show in defense to a suit for breach of promise of marriage that he was afflicted with an incurable disease: *Sprague v. Craig*, 51 Ill. 288.

CHAPTER VII.

ON SALE AND DELIVERY OF CHATTELS.

*No. 699.**i. Explaining the Contract, and Showing a Breach as to Delivery.*

[TITLE.]

The defendant answers to the complaint:

I. That it was a part of the agreement referred to in the complaint, that the plaintiff should deliver the goods sold at.....

II. That the said goods have not been so delivered.

1. Damages by Way of Recoupment.—Damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer: *Cole v. Swanston*, 1 Cal. 51.

2. Disclaimer.—It is not a sufficient objection to the plea, that it omits a disclaimer of the contract, and a proffer to return the property. If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in his plea: *Withers v. Green*, 9 How. U. S. 214.

3. Estoppels.—A party retaining goods delivered under an executory contract, without objection, held estopped from afterwards denying their value: *Fisher v. Merwin*, 1 Daly, 234. A transaction imbued with the fatal infirmity of being in violation of law cannot be purged of its infirmity by means of an estoppel: *Martin v. Zellerbach*, 38 Cal. 300.

4. Insufficient Answer.—If the complaint avers the sale and delivery to defendant of goods, and the value of the same, an answer which denies the indebtedness, but does not deny the facts of the sale and delivery and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts: *Lightner v. Menzell*, 35 Cal. 452.

5. Tender.—A tender of warehouse receipts for grain, issued by responsible parties, is a sufficient tender of the grain in Chicago, unless objected to by the other party at the time: *McPherson v. Gale*, 40 Ill. 368. After a sale at buyer's option within a certain time, notice by the buyer before the time has expired that he will not accept the goods within or at the end of such time, waives a tender by the seller: *McPherson v. Walker*, 40 Ill. 371; see *White v. Dobson*, 17 Grat. (Va.) 262; *Millingar v. Daly*, 56 Penn. St. 245. A plea to an action on a bond to deliver goods at a certain time and place, should state that the defendant was at the place appointed, in person or by his agent, ready to deliver, etc.: *Savary v. Goe*, 3 Wash. C. Ct. 140.

*No. 700.*ii. *The Same—Breach of Warranty by Plaintiff.*

[TITLE.]

The defendant answers to the complaint:

I. That the goods therein mentioned were warranted by the plaintiff to be [genuine French broadcloth].

II. That they were not [genuine French broadcloth].

*No. 701.*iii. *The Same, as to Quality.*

[TITLE.]

The defendant answers to the complaint:

I. That it was a part of the agreement referred to in the complaint, that the wheat therein mentioned should be of a first class milling quality.

II. That the said wheat was not of a first class milling quality, but [state wherein the quality was defective].

6. Defect in Quality.—Where a seller at the time of the sale agrees that if the goods when delivered are inferior to the sample they may be exchanged, it is a conditional sale, and the inferiority of the goods is no defense to an action for the price: *Fisher v. Merwin*, 1 Daly, 234. A defect of quality in goods sold does not, in the absence of fraud or warranty, constitute a defense to the note given for the price or any part of it. This rule applied where the note was that of a third party: 25 N. Y. 306; 4 Bosw. 36; *Delano v. Ransom*, 10 Bosw. 286. Suit on note for the purchase of land. Answer set up that the note was given for the land, fencing and building materials; that plaintiff falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: *Held*, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to fences, they being in this case part of the freehold: *Held*, further, that a special demurrer being put in to the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber contracted for, and not delivered, and this at the time of contracting: *Kinney v. Osborne*, 14 Cal. 112.

7. Executing Contracts.—Where defendants order, of plaintiffs, goods of a certain description, which were to be procured by the plaintiff from abroad, and the goods delivered did not answer the order: *Held*, that the doctrine of *caveat emptor* had no application, the contract being executory, and defendants might recoup from the price of the goods their damages for the defect in quality, although no fraud was charged against the plaintiff: *Renaud v. Peck*, 2 Hilt. 137. If a drove of pigs are sold, with warranty that they are sound, and some of them have an infectious disease at the time of the sale, and others take it afterwards, the purchaser may recoup the damage so caused, as well after the sale as before, when sued for the price: *Bradley v. Rea*, 14 All. 20

8. Recoupment.—In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action: *Earl v. Bull*, 15 Cal. 425. The plea of *non est factum* is a nullity in an action of debt on simple contract: *Gebhart v. Francis*, 32 Penn. 78. The plea of *non est factum* did not admit the plaintiff's damages: *Bennett v. Brown*, 31 Barb. 158. Where the defendant pleaded that the obligation was given for horses, which did not prove to be sound or of as high a pedigree as had been represented to the seller, the plea was admissible if the defendant looked only to the mitigation of damages: *Withers v. Greene*, 9 How. U. S. 213.

CHAPTER VIII.

ON SALE OF REAL PROPERTY.

No. 702.

i. *Denial of Agreement.*

[TITLE.]

The defendant answers to the complaint:

That he did not agree with the plaintiff as alleged, or at all.

No. 703.

ii. *Denial of Plaintiff's Performance.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [here state breach, as if in a complaint against him].

1. Fraud.—A fraud, or breach of warranty, must be specially alleged in the answer, in order to be admissible in proof: *Deifendorf v. Gage*, 7 Barb. 18. The mere fact that a vendor of land was aware of the existence of a judgment, which was an incumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to suit on a note for the purchase-money, where the means of information—to wit, the county records—were equally accessible to both parties. In such case, if the vendee neglect to inform himself, he is guilty of negligence, and cannot set up his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been misled: *Ward v. Packard*, 18 Cal. 391.

*No. 704.*iii. *The Same.*

[TITLE.]

The defendant answers to the complaint:

I. That the plaintiff warranted the property therein mentioned to be free from all incumbrances.

II. That there was then and still is a mortgage on the same, in the sum of.....dollars, unsatisfied of record in Book, page....., of Mortgages, in the office of the Recorder of the County of...., in this State, and the same then was and still is a valid and subsisting lien and incumbrance upon the said premises.

NOTE.—This form is from the New York Code Commissioners' Book of Forms.

1. Covenant against Incumbrances.—In order to enable one to maintain an action upon a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee: *Swall v. Clarke*, 51 Cal. 227. The weight of American authority is that a covenant against incumbrances, as generally expressed, standing by itself as a separate and independent covenant, is a covenant *in presenti*, and broken, if at all, at the instant of its creation, and does not run with the land: 2 Wait's Pr. 380. As to an action or defense, much depends upon the form of the covenant. If coupled with a covenant for quiet enjoyment, it is held to be *in futuro*, and to run with the land: *Hutchins v. Moody*, 30 Vt. 658; *Hall v. Dean*, 13 Johns. 105. If the covenant is simply one of indemnity, the covenantee can only recover nominal damages, unless he can show actual damages, or that he has had to pay money to remove it: 3 Denio, 321, 326; 59 Ill. 38; 66 Pa. St. 375, 381. But if it is to perform some specific thing, or save the covenantee from a charge or liability, the right of action is complete upon a failure to do the act, or when such charge or liability is incurred: 17 Johns. 239; 16 Me. 280; 35 Id. 309; 1 N. Y. 550.

CHAPTER IX.

ON UNDERTAKINGS, BONDS, ETC.

*No. 705.*i. *Failure of Consideration.*

[TITLE.]

The defendant answers to the complaint:

I. That he gave said undertaking to said A. B. solely in consideration of the performance by said A. B. of the covenants and conditions, upon his part, in an agreement then made between them, of which agreement a copy is annexed as a part of this answer.

II. That this defendant duly performed all the conditions thereof on his part.

III. That the said plaintiff [allege breach as in an action upon the contract].

1. **Assignment.**—Where a clerk of a court was sued upon his official bond, and the breach alleged was that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond, this plea was sufficient, and a demurrer to it was properly overruled: *Bevins v. Ramsey*, 15 How. U. S. 179.

2. **Avoidance.**—Matters in avoidance of a sealed instrument must be pleaded specially: *Greathouse v. Dunlap*, 3 McLean, 303. A plea which alleges that the bond sued on was obtained fraudulently; that its consideration was the price of chattels sold at auction, on which he, in order to induce bids by others, bid five hundred dollars, well knowing that the said chattel was unsound, and that the defendant offered to return the chattel, is good. *Casey v. Smales*, 4 Mo. 77.

3. **Consideration Controverted.**—The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this state has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer: *McCarty v. Beach*, 10 Cal. 461; *Wills v. Kempt*, 17 Cal. 96. Cal. Civ. Code, sec. 1629, abolishes all distinctions between sealed and unsealed instruments.

4. **Date of Payment.**—A bond for the performance of a duty, and for an indemnity, is not within the provision of that statute which allows the plea of payment after the day: *Hart v. Meeker*, 1 Sandf. 623. A plea of payment of part of a bond, and acceptance in full, is bad. *Doderick v. Leman*, 9 Johns. 333; but see Cal. Civ. Code, secs. 1524 and 1629.

5. **Defective Answer.**—In an action on an undertaking executed by and on behalf of the defendants, in a judgment in ejectment, conditioned to pay the value of the use and occupation of the premises pending the appeal, an answer setting up that pending the appeal the plaintiff conveyed a part of the premises to one or more of the defendants in the judgment, and had leased portions to other parties, does not state facts sufficient to constitute a defense: *De Castro v. Clark*, 29 Cal. 11. Such answer failing to show when the conveyance was made, it will be deemed not to have been made until the last day the appeal was pending: *Id.* Such answer is also defective in not stating that the use and occupation of the portions of the premises conveyed and leased was of any value: *Id.* In an action on an undertaking given in suing out an injunction, the defendants cannot object, by way of defense, that the business which they enjoined was a public nuisance: *Cunningham v. Breed*, 4 Cal. 384. Conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and in a suit thereon the plaintiff would be entitled to the full amount: *Swain v. Grave*, 8 Cal. 549.

6. Duplicity.—In an action on a bond for the payment of certain sums of money at Amsterdam, the plea was that the money was paid. Replication, that the sum paid was not accepted in satisfaction by the agents of the plaintiffs; that the sum was not paid on the day appointed; and that damages and interest due for non-payment were not paid. The pleas were bad for duplicity: *United States v. Gurney*, 1 Wash. C. Ct. 446; affirmed, 4 Cranch, 338. In an action against a surety, one plea alleged a discharge of the defendant by the neglect of the plaintiff to sue the principal upon notice so to do. Another plea set up a discharge owing to an extension of the time of payment. It seems that the pleading was bad for duplicity: *Taylor v. Davis*, 38 Miss. 493; see, however, Cal. Code C. P., sec. 441; *Bell v. Brown*, 22 Cal. 678; *Buhne v. Corbett*, 43 Id. 264.

7. False Representations.—A false representation made by the principal to a surety on a bond before his signing the same, that a party whose name appeared thereon as surety had signed said bond, will discharge said surety: *Chamberlin v. Brewer*, 3 Bush, 561.

8. Former Action.—In an action upon a sheriff's official bond, the pendency of a former action upon the same bond may be pleaded in bar; and if found by the verdict, the plea is good: *Commonwealth v. Cope*, 45 Penn. 161. This, however, was under a special statute authorizing but one suit on an official bond, and giving to all persons having several interests the right to join in that suit, or to make use of the judgment recovered if their cause of action accrue after the judgment.

9. Insanity.—Insanity is not a defense on an injunction bond, it not appearing that plaintiff knew the fact: *Behrens v. McKenzie*, 23 Iowa, 333.

10. Insufficient Defense.—A defendant cannot plead that the only evidence of a breach of bond consists in a certain paper, and then proceed to show that such paper does not prove a breach. He is not allowed to make the case turn on his allegation concerning the proofs of his adversary: *United States v. Girault*, 11 How. (U. S.) 22.

11. Joint Plea.—A plea which is entire cannot be good in part and bad in part, an entire plea not being divisible; and, consequently, if the matter pleaded be insufficient as to one of the parties, it is so *in toto*. On a joint plea, therefore, of *non est factum* to a bond, if the bond is the deed of any of the defendants, the plea is bad as to all, and the plaintiff is entitled to judgment: *United States v. Linn*, 1 How. (U. S.) 104; S. C., 17 Pet. 88.

12. Novation.—Taking a note from the obligor in a bond payable in terms at the same time as the bond, and for the same debt, discharges the sureties on the bond, because the days of grace have to be added before the note is payable, and so time is given to the principal: *Appleton v. Parker*, 15 Gray, 173. Where an answer contains an allegation of alteration in an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff: *Humphreys v. Crane*, 5 Cal. 173.

13. Positive Averments.—Every plea in discharge or avoidance of a bond should state positively and in direct terms the matter in discharge or avoidance, and not leave the defense relied on to be inferred: *United States v. Bradley*, 10 Pet. 343; compare *Mayor of Alexandria v. Moore*, 1 Cranch C. Ct. 440; *Wood v. Franklin*, 3 Id. 115; *Tucker v. Lee*, Id. 684. A plea seeking to avoid a bond for being illegally taken in *colore officii*, should specially

state all the facts which show that illegality: *United States v. Sawyer*, 1 Gall. 86.

14. Replevin.—In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him, is bad: *McDermott v. Isbell*, 4 Cal. 113. Where the defendant, in a replevin suit, failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid: *Held*, that the payment of the judgment, as taken, was a complete discharge of plaintiffs' sureties on the undertaking: *Chambers v. Waters*, 7 Cal. 390.

15. Seals not Affixed.—A plea, alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiffs, is not sufficient: *United States v. Linn*, 1 How. (U. S.) 104.

16. Set-Off.—Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against J. R. D. and J. T. R., and eleven other defendants in that suit, upon the ground that J. R. D. and J. T. R. are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset, are insolvent: *Held*, that the set-off cannot be allowed: *Held, further*, that the matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset, and therefore such matter cannot be relied on as an equitable defense independent of and beyond the right of offset given by the practice act: *Duff v. Hobbs*, 19 Cal. 646.

17. Suffolient Answer.—In an action upon an undertaking which was given upon issuing an injunction, and was conditioned to pay all damages sustained thereby, "if the court shall finally decide that the plaintiff (in the injunction suit) was not entitled thereto," if the complaint avers that judgment has been rendered in the injunction suit in favor of the defendants, but does not disclose the ground of the judgment, nor aver in terms that the court has decided that the plaintiff therein was not entitled to the injunction, an answer merely denying that it has been so decided, and the present plaintiff has been damnified, and that defendant is indebted to him, is not irrelevant, and raises a material issue: See *McHenry v. Hazard*, 45 Barb. 657. Nor is it shown to be sham by an affidavit stating that the complaint in the injunction suit was dismissed, but not disclosing on what ground.

18. Void Contract.—Whenever a contract or obligation under seal is void *ab initio*, the general plea of *non est factum* is proper. Where it is merely voidable, a special plea, setting forth the special circumstances is necessary: 2 Stra. 1104; Bull. N. P. 172; 16 Mass. 348; *Bottomley v. United States*, 1 Story C. Ct. 135. On the plea of *non est factum* in an action on a bond, the present validity of the instrument is in issue, and every circumstance that goes to show that it is not the deed or contract of the party is provable: *Speake v. United States*, 9 Cranch, 28.

ANSWERS—SUBDIVISION THIRD.

Injuries to the Person.

CHAPTER I.

ASSAULT AND BATTERY.

No. 706.

i. *General Denial.*

[TITLE.]

The defendant answers to the complaint:

That the defendant has not committed the acts alleged, or any one of them [or, the defendant denies each and every allegation thereof].

No. 707.

ii. *The Same—Denial of Battery.*

[TITLE.]

The defendant answers to the complaint:

That the defendant did not strike nor wound the plaintiff.

1. Aggravated Circumstances need not be denied; they are not traversable: *Schnaderbeck v. Worth*, 8 Abb. Pr. 37; *Gilbert v. Rounds*, 14 How. Pr. 46; *Lane v. Gilbert*, 9 Id. 150.

2. Counter-claim.—In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant does not constitute a counter-claim. The objection to such counter-claim is not waived by a failure to demur, and evidence to support it is inadmissible: *Macdougall v. Maguire*, 35 Cal. 274.

3. Justification.—In an action for assault and battery, and false imprisonment, a special plea of justification, which states matters which occurred subsequent to the suit, is bad on demurrer: *Lockington v. Smith*, Pet. C. Ct. 466.

4. Mitigation of Damages.—In an action for assault or for false imprisonment, evidence in mitigation of damages may be given, without being pleaded: *Travis v. Barger*, 24 Barb. 614; *Hays v. Berryman*, 6 Bosw. 679; see, however, *Foland v. Johnson*, 16 Abb. Pr. 235. So, evidence in mitigation may be given under a general denial: *Kneedler v. Sternberg*, 10 How. Pr. 68; *Dunlap v. Snyder*, 17 Barb. 561. Insulting language may be shown in evidence in mitigation: *Cushman v. Ryan*, 1 Story, 91; *Castner v. Slyker*, 33 N. J. 95; *Dolan v. Fagan*, 63 Barb. 73. And when the acts done, or words spoken, are a portion of a series of provocations, frequently repeated and continued down to the time of the assault, they may be proven: *Stellar v. Nellis*, 60 Barb. 524; S. C. 42 How. Pr. 163. But no provocation, it would seem,

amounting to less than a justification, will render the defendant liable to less than compensatory damages: *Bischoff v. Booth*, 4 Wis. 67; *Dresser v. Blair*, 28 Mich. 501. But circumstances which amount to a complete justification are not admissible in evidence in mitigation unless pleaded: *Watson v. Christie*, 2 Bos. & Pul. 224.

5. Threats.—A previous threat, alone and unaccompanied by any immediate demonstration of force at the time of the rencounter, will not justify or excuse an assault: *People v. Scoggins*, 37 Cal. 684. But if there be at the time such a demonstration of force as would induce a well-founded belief in the mind of a reasonable person that his adversary was on the eve of executing his threat, and that his only means of escaping from death or great bodily injury was immediately to defend himself against the impending danger, the law of self-defense would justify him in the use of whatever force was necessary to avert the threatened peril: *Id.*

No. 708.

iii. *The Same—Self-defense.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff first assaulted the defendant, who thereupon necessarily committed the acts complained of, in self-defense.

6. Justification.—One is justified in using violence in defending himself against violence, but he must not exceed what is necessary to self-defense: *People v. Williams*, 32 Cal. 280; *People v. Campbell*, 30 Cal. 312; *Scribner v. Beach*, 4 Den. 448. An assault cannot be justified as made in self-defense, unless the danger of injury is so manifest and pressing that no other reasonable means of self-protection are immediately available: *Keyes v. Devlin*, 3 E. D. Smith, 518.

7. Mutual Violence.—Where violence is committed on both sides, there cannot be a recovery by both parties in cross-action. The party who first recovers may plead that recovery in the suit against himself for the same affray. Hence, the party first attacked is not entitled to maintain an action, if he uses violence in repelling the assault exceeding what is required for self-defense: *Salk.* 642; 1 *Ld. Raym.* 177; 1 *Bay.* 351; 15 *Mass.* 347; *Elliott v. Brown*, 2 *Wend.* 497.

No. 709.

iv. *Acts Done to Preserve the Peace.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant did not strike or wound the plaintiff.

II. That at the time mentioned in the complaint, the plaintiff made an assault on one B., and was then and there beating him.

III. That thereupon the defendant, in attempting to preserve the peace, and prevent the plaintiff from further so

doing, gently laid his hands upon the plaintiff, by which plaintiff suffered no injury.

IV. That the acts above mentioned are the same of which the plaintiff complains.

8. **Preserving the Peace.**—A person who witnesses an affray may, during its continuance, and for the purpose of putting a stop thereto, lay hands upon those engaged in the affray: *Noden v. Johnson*, 16 Q. B. 218; *Timothy v. Simpson*, 6 Carr. & P. 500.

No. 710.

v. *Defense of Possession of Dwelling.*

[TITLE.]

The defendant answers to the complaint:

I. [Deny beating and wounding.]

II. The defendant further alleges, that at the time mentioned in the complaint the defendant was lawfully possessed of [here designate the dwelling].

III. That the defendant being so possessed thereof, the plaintiff was unlawfully therein, and [state unlawful acts he was doing].

IV. That thereupon the defendant, in defense of the possession of his dwelling, gently laid his hands upon the plaintiff in order to remove him, as he lawfully might.

V. That the acts above mentioned are the same of which the plaintiff complains.

9. **Defense of House, Land, etc.**—One in the peaceable possession of house or lands, and having the right so to be in possession, will be justified in using all necessary force to defend his possession against any forcible attempt to expel him: *Cerey v. The People*, 45 Barb. 262; *Parsons v. Brown*, 15 Id. 590. The son of the owner, acting under the latter's authority, has the same right: *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 599, 617; see, also, 50 N. H. 527; 45 Ill. 367. A ticket of admission to a place of public amusement held to be only a revocable license: 1 Allen (Mass.), 133; 12 Gray, 211; 13 Mees. & Wels. 838. Where one is peaceably in the house of another for a lawful purpose, as for the purpose of serving a subpoena, he may use such force as is necessary to overcome any force used to prevent it, being liable only for any excess of violence: *Hagar v. Danforth*, 20 Barb. 16; reversing S. C., 8 How. Pr. 435.

No. 711.

vi. *The Same—Resistance of Entry.*

[TITLE.]

The defendant answers to the complaint:

I. and II. [As in preceding form.]

III. That the plaintiff then and there, with force and violence, attempted to break into the said dwelling [or other

possession], without the leave and against the will of the defendant.

IV. That the defendant thereupon, in order to preserve the peaceable possession thereof, resisted the plaintiff's entrance, and in doing so necessarily assaulted and beat the plaintiff, as he lawfully might; and if the plaintiff sustained any damage, it was occasioned by his own wrong.

V. That the acts above mentioned are the same of which the plaintiff complains.

No. 712.

vii. *Justification by Captain of Vessel.*

[TITLE.]

The defendant answers to the complaint:

I. That as to the alleged assaulting, beating, and ill-treating the plaintiff, the defendant was, at the time thereof, captain of the ship called the.....

II. That the plaintiff was then on board of said ship as a seaman. [State excuse for beating him, such as mutiny, etc.]

III. Wherefore the defendant, for the preservation of the peace, and to preserve due order on said ship [state what was done].

10. **Justification of Master.**—The master or commander of a vessel, in general, is not liable for chastisement inflicted on a seaman or marine, where he acted under a sincere conviction that it was necessary to enforce discipline, or compel obedience to orders, and not from passion or revenge: *Dinsman v. Wilkes*, 12 How. U. S. 390; *United States v. Freeman*, 4 Mason, 505; *Thompson v. Busch*, 4 Wash. C. Ct. 338; *Thorne v. White*, Pet. Adm. 168.

11. **Misconduct, Degrees of.**—So, where the master acts believing from the circumstances that there is immediate danger from a mutiny: *Roberts v. Eldridge*, Sprague, 54; *United States v. Colby*, Id. 119; *United States v. Lent*, Id. 311. What degree of misconduct, or circumstances of provocation, on the part of a seaman, will justify corporeal punishment or correction by an officer, see *Morris v. Cornell*, Sprague, 62; *Payne v. Allen*, Id. 304; *Sheridan v. Furbur*, Blatchf. & H. 423. And as to instruments and modes of punishment, see *Benton v. Whitney*, Crabbe, 417; *Shelter v. York*, Id. 449; *Forbes v. Parsons*, Id. 283; *United States v. Cutler*, 1 Curt. C. Ct. 501; *Saunders v. Buskup*, Blatchf. & H. 264; *Shorey v. Rennel*, Sprague, 467; see *Noden v. Johnson*, 2 Eng. Law and Eq. 201.

*No. 713.*viii. *Justification of Removing Plaintiff from Railroad Car for Non-payment of Fare.*

[TITLE.]

The defendant answers to the complaint:

I. That the defendant was, before and at the time when the said supposed grievances were committed, the conductor, and had charge of a passenger train on the railroad of the Railroad Company, running from to

II. That one of the regulations of said Railroad Company was, that no person should be permitted to be and remain on such train without having a ticket therefor, duly obtained of their authorized agents.

III. That at the time mentioned in the complaint, the plaintiff was on the said train, without having a ticket therefor as aforesaid, and then and there refused to purchase a ticket or to pay his fare.

IV. That the defendant then and there requested the said plaintiff to leave the said train, which the plaintiff refused to do; whereupon the defendant then and there gently laid his hands upon the plaintiff, and removed him from the train, doing no unnecessary violence, as he lawfully might do; which is the same act complained of by the plaintiff.

12. Justification of Conductor.—A conductor of a train is protected in putting out of the cars a passenger who has refused to pay his fare: *People v. Jillson*, 3 Park. Cr. 234; 34 Md. 532; 4 Lans. (N. Y.) 147. They are limited to the use of just so much force as may effect that object, and no more; *Hubbard v. New York and E. R. R. Co.*, 15 N. Y. 455; and must be consistent with the safety of passenger's life: *Sanford v. Eighth Av. R. R. Co.*, 23 N. Y. 343; *Illinois, etc., R. R. Co. v. Sutton*, 53 Ill. 397. Thus, a railroad company may be held liable for forcibly expelling a person from the cars while the train is in motion, and it is no defense that such person was not rightfully on the train: 32 Iowa, 534; 23 N. Y. 343; 39 Cal. 587; 47 N. Y. 274.

13. Form.—The above form is taken from Nash's Ohio Pl. and Pr., No. 323.

14. General Denial.—Where a conductor upon a railroad is sued for a battery in forcibly ejecting a passenger, under general denial he cannot prove the existence of rules of the company, that they were reasonable, and that his acts were done in conformity with such rules: *Pier v. Finch*, 29 Barb. 170.

CHAPTER II.

FALSE IMPRISONMENT.

*No. 714.*i. *Denial of Arrest.*

[TITLE.]

The defendant answers to the complaint:

That the defendant did not cause said order of arrest [or warrant] to be issued.

1. General Denial.—In an action for malicious arrest, a general denial puts in issue the want of probable cause: *Dreux v. Domec*, 18 Cal. 83; *Rost v. Harris*, 12 Abb. Pr. 446; *Radde v. Ruckgaber*, 3 Duer, 685; *Simpson v. McArthur*, 16 Abb. Pr. 302. The denial must be positive. A denial on information and belief will not be allowed: *Lawrence v. Derby*, 15 Abb. Pr. 346.

*No. 715.*ii. *Denial of Want of Probable Cause.*

[TITLE.]

The defendant answers to the complaint:

That the defendant did not, falsely or maliciously, or without probable or reasonable cause, cause the plaintiff to be arrested; nor did he cause plaintiff to be arrested at all.

2. How Pleased.—In an answer in an action for malicious prosecution, it is superfluous to set forth facts showing probable cause: *Radde v. Ruckgaber*, 3 Duer, 684. And if the allegation of want of probable cause be denied, it is redundant to allege probable cause as a separate defense: *Rost v. Harris*, 12 Abb. Pr. 446.

3. Justification under Legal Process.—The defense that the imprisonment was under lawful process must be specially pleaded: *Allen v. Parkhurst*, 10 Vt. 557. And it has been held, that to exempt one from liability for causing the arrest on meane process, it must be apparent not only that he believed, but also that he had reason to believe, the essential fact averred in his affidavit, as, in this instance, that the debtor was about to leave the state: *Gee v. Patterson*, 63 Me. 49. In Indiana it is not necessary to a constable's justification of an arrest under a *capias ad respondendum*, issued by a justice that the writ should be supported by affidavit: *Davis v. Bush*, 4 Blackf. 330. But it is otherwise if the justification be attempted by the party or the justice: *Id.* Where, in an action for false imprisonment, the defendant, by special plea, set up legal process, in justification of the imprisonment charged, and then averred that he did not arrest the plaintiff, but that the latter voluntarily gave bail: *Held*, that the plea was bad for duplicity: *Stanton v. Seymour*, 5 McLean, 267. Simply pleading a justification, without denying the want of probable cause, admits the latter: *Morris v. Corson*, 7 Cow. 281. In an action for false imprisonment, unless the defendant is an officer, the answer

should state the circumstances, from which the court may judge whether the suspicion was reasonable: *Mure v. Kaye*, 4 Taunt. 34. What constitutes sufficient probable cause to justify a prosecution for larceny: *Haupt v. Pohlmann*, 16 Abb. Pr. 301. A justice, justifying his imprisonment of another, must show that he fills the office, not merely *de facto* but *de jure*: *Newman v. Tiernan*, 37 Barb. 159. See, as to necessity of a full and special plea of justification, when interposable: *Brown v. Chadsey*, 39 Barb. 253.

4. Waiver of Right of Action.—The right of action for false imprisonment may be lost by a waiver thereof. Thus, where the plaintiff was arrested upon an execution improperly issued, and instead of being discharged from execution by the defendant, after three months' confinement, obtained his liberation under the act for the relief of debtors, it was held that he thereby waived the error and affirmed the execution: *Reynolds v. Church*, 3 Caines, 274; see *Fuller v. Bowker*, 11 Mich. 204. So where a defendant in an action was arrested under a judge's order, and offered bail to the plaintiff's attorneys, and induced them to examine and accept the bail, held a waiver of any objection to his having been held to bail: *Dale v. Radcliffe*, 25 Barb. 333. An agreement not to bring an action for false imprisonment if founded on a good consideration, is binding: See *Wentworth v. Bullen*, 9 B. & C. 840.

No. 716.

iii. *Justification of Arrest upon Suspicion of a Felony.*

[TITLE.]

The defendant answers to the complaint:

I. That immediately before the time mentioned in the complaint a felony was committed [briefly state the felony and causes of suspicion against the plaintiff].

II. That thereupon the defendant, who was then and there sheriff of the county of, having reasonable cause to suspect the plaintiff of having committed such felony, arrested him and brought him before J. P., a justice of the peace of, [or other magistrate] to be dealt with according to law.

III. That the above acts are the same of which plaintiff complains.

5. Defense.—It is a good defense for assault and battery, that the complainant had committed petit larceny, and that the alleged assault consisted in arresting him therefor: *People v. Adler*, 3 Park. Cr. 249. So, private persons may be justified for an assault in arresting persons in the act of committing a felony: *People v. Wolven*, 7 N. Y. Leg. Obs. 89; *People v. McArdle*, 1 Wheel. Cr. 101.

6. Form.—The above form is from Abbott's Forms, No. 1016.

*No. 717.**iv. The Same—Of Arrest under Criminal Process.*

[TITLE.]

The defendant answers to the complaint:

I. That before and at the time of the committing of the alleged trespasses he, the said defendant, was a constable [or sheriff] within and for the town [or county] of

II. That a warrant duly issued by one A. B., under his hand and seal, and directed to any constable [or sheriff] of said, which then was delivered to this defendant as such constable [or sheriff], to be executed; whereby he was commanded to arrest the said plaintiff and bring him forthwith before said Justice [or state before whom], there to answer to the charge of having feloniously stolen and carried away the goods and chattels of one, to the value of dollars [setting forth the tenor of the writ or warrant according to its effect].

III. That the said A. B. then was a justice of the peace, within and for the town of, duly elected and qualified, and acting as such.

IV. That by virtue of the said warrant so issued, he, the said defendant, did arrest the said plaintiff, and had him in his custody until he was discharged [or state facts].

7. Trespass.—In trespass to persons a justification under civil process, meane or final, must be pleaded specially by the party in whose favor it is issued. Such a justification does not sustain the plea of not guilty. And the rule is the same whether the defendant made the arrest or only directed it to be made: *Coats v. Darby*, 2 N. Y. 517.

*No. 718.**v. Justification by Officer, of the Same.*

[TITLE.]

The defendant answers to the complaint:

I. That at and immediately before the time mentioned in the complaint, the defendant was a constable of the town of [or designate other official character].

II. That he was then informed by [here state sources of information], that a felony had been committed, in the robbery of [state felony, and the grounds for suspicion of the plaintiff].

III. That thereupon, believing such information to be true, and acting thereon, as was his duty to do, he arrested

him, and brought him before J. P., a justice of the peace, of, [or other magistrate], to be dealt with according to law.

IV. That the above acts are the same of which plaintiff complains.

8. Form.—As to the sufficiency of this defense, see *Holly v. Miz*, 3 Wend. 350.

CHAPTER III.

LIBEL AND SLANDER.

No. 719.

i. Denial of Inducement.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff was or is a [physician], either as alleged or otherwise.

1. Code.—In a complaint it is sufficient to state generally that the words were spoken or published concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so spoken or published: Cal. Code C. P., sec. 460. The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances: *Id.*, sec. 461.

2. Colloquium.—The office of a colloquium is to point the libel and explain the circumstances which render libelous words which otherwise might be innocent and harmless: *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 210. The extrinsic facts necessary to show the libelous meaning of the words must be set forth in the colloquium, and the innuendo applies the words spoken or published to these facts: *Wilson v. Fitch*, 41 Id. 378; *Nicholls v. Packard*, 16 Vt. 83; *Linville v. Earlywine*, 4 Blackf. 469; *Tappan v. Wilson*, 7 Ohio, 193. The office of the innuendo is to direct to its object the charge made. It can neither enlarge nor restrain the natural import of the words used: *Id.* 194. If the words do not convey the sense and meaning where their application is explained by the colloquium, the innuendo cannot aid them: *Id.* When a libel is not actionable on its face, but has a covert libelous meaning, the subject matter must be explained, and the true interpretation of the words brought to light by the colloquium, and in such cases the colloquium must be proved: *Wilson v. Fitch*, 41 Cal. 378. If the libel is actionable on its face, a colloquium is unnecessary, and if alleged need not be proved: *Id.*; see, also, *Chamberlain v. Vance*, 51 Id. 75.

3. Damages, Aggravation of.—If the defendant alleges matter which, if true, would tend to show that the plaintiff was guilty of the crime charged in the slanderous words, not believing, or having no reason to believe them

true, this might properly be considered by the jury as showing a continuing and express malice: *Chamberlain v. Vance*, 51 Cal. 85.

4. Denial and Justification.—The defendant may in one answer set up a general denial or not guilty, and a justification on the ground of truth: 5 Duer, 665; 3 All. 69; 1 Brevard, 283; 39 Penn. 441; 9 Humph. 215. As to whether justification and denial are to be considered as inconsistent defenses, the authorities are conflicting. The following cases treated them as inconsistent: *Ormsby v. Douglass*, 2 Abb. Pr., 407. And hypothetical pleading, or a plea that if defendant did speak the words they are true is bad: *Buddington v. Davis*, 6 How. Pr. 401; *Anibal v. Hunter*, Id. 255; and see *Lewis v. Kendall*, Id. 59; *Sayles v. Wooden*, 1 Code R. (N. S.) 410; S. C., 6 How. Pr. 84. They have been held to be not inconsistent in the following cases: *Stiles v. Comstock*, 9 Id. 48; *Buhler v. Wentworth*, 17 Barb. 649; *Hollenbeck v. Clow*, 9 How. Pr. 289; and see *Lansing v. Parker*, Id. 288; *Vaughn v. Havens*, 8 Johns. 109. But he cannot, with not guilty as to the whole complaint, plead a special plea of apology and payment into court as to part of the complaint: *O'Brien v. Clement*, 15 M. & W. 435; 3 D. & L. 676. In an action for libel, where the answer contained: First, a denial of the publication; Second, a justification; it was held, on demurrer to the justification, that the denial remained on the record, and raised an issue of fact: But see *Parrett Nav. Co. v. Stower*, 8 Dowl. Pr. Cas. 405.

5. General Denial.—Evidence of the bad character of the plaintiff, in an action of slander, is not admissible under the general denial: Anonymous, 6 How. Pr. 160. Or in breach of promise: *Button v. McCauly*, 38 Barb. 413. In actions for slander under the general denial, defendant may give in evidence the general bad character of the plaintiff: Anonymous, 8 How. Pr. 434; *contra*, Anonymous, 6 Id. 160. Where a general denial is filed to a paragraph of a complaint for slander and malicious prosecution, and afterwards withdrawn, the facts alleged in such paragraph are to be taken as true: *George v. Nelson*, 23 Ind. 392. An answer which merely states that the defendant did not utter the words alleged, at the place and time alleged, may be good as a general denial: *Salinger v. Lusk*, 7 How. Pr. 430. An averment in the complaint of plaintiff's former good character need not be denied: *Pink v. Catanich*, 51 Cal. 420.

6. Insufficient Plea.—That the letter containing the defamatory language was intended for the plaintiff himself, was held bad: *Fox v. Broderick*, 14 Irish Com. Law Rep. 453.

7. Intent and Motive.—Allegations in a complaint, relative to the intent and motives of a libelous publication, are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer: *Fry v. Bennett*, 5 Sandf. 54.

8. Justification.—To constitute a justification, the answer must aver the truth of the defamatory matter charged. The averment of facts which merely *tend* to establish the truth of the matter charged, is not sufficient in justification, though they may go in mitigation: *Merk v. Gelzhaeuser*, 50 Cal. 633. If the slanderous words impute a crime to the plaintiff, a defendant who justifies must prove the plaintiff guilty by testimony sufficient to convict the plaintiff of the same charges upon a criminal trial; and this rule has not been changed by sec. 2061 of the Cal. Code C. P.: Id. An answer of justification must give color to the extent of admitting for the purposes of the answer only, the pub-

lication complained of: *Fidler v. Delavan*, 20 Wend. 57; *Vanderveer v. Sutphin*, 5 Ohio St. 293; *Edsall v. Russell*, 2 Dowl. (N. S.) 641; 5 S. C. (N. S.) 801; *Buddington v. Davis*, 6 How. Pr. 402. The justification must always be as broad as the charge: 2 B. & C. 678; 4 D. & R. 230; *Stillwell v. Barter*, 19 Wend. 478; *Cooper v. Barber*, 24 Id. 105; *Bissell v. Cornell*, 24 Id. 354; *Torrey v. Field*, 10 Vt. 353; *Burford v. Wible*, 32 Penn. 95; *McKinly v. Rob*, 20 Johns. 354; *Herr v. Bamburg*, 10 How. Pr. 130; *Loveland v. Hosmer*, 8 Id. 215. And must justify the same words used in the complaint: *Skinner v. Grant*, 12 Vt. 456; *Ormsby v. Douglas*, 2 Abb. Pr. 407.

9. Justification.—See, as to the necessity of averment of special circumstances, in interposing plea of justification, and that general allegation of truth of charge will not avail: *Wachter v. Quenzer*, 26 N. Y. 547. And such plea must be certain, specific and particular, as the code has not changed the former rules on the subject: *Billings v. Waller*, 28 How. Pr. 97; *Tilson v. Clark*, 45 Barb. 178. Held, that pleas of the above nature are rather in the nature of a notice than of an allegation of new matter: *Maretzek v. Cauldwell*, 19 Abb. Pr. 35. Although the facts set forth in a special plea do not amount in law to a justification, yet, if issue be joined thereon, and the facts are found as pleaded, it is error in the judge to instruct the jury that the facts as proved do not in law maintain the issue on the part of the defendant: see *Otis v. Watkins*, 9 Cranch, 339.

10. Justification and Mitigation.—Matter in mitigation may be pleaded either with or without a plea of justification. And a plea of justification, whether proven or not, does not conclude the defendant from the benefit of evidence of mitigating circumstances: Cal. Code C. P., sec. 461; *Bush v. Prosser*, 11 N. Y. 347; *Russ v. Brooks*, 4 E. D. Smith, 644. But see *Gorton v. Keeler*, 51 Barb. 475.

11. Mitigation, how Pleaded.—Matter in mitigation must be separately stated from matter in justification: *Follet v. Jewett*, 11 N. Y. Leg. Obs. 193. But matter which is alleged in justification may also properly be alleged in mitigation of damages: *Howard v. Raymond*, 11 Abb. Pr. 155.

12. Mitigation—Requisites of Defenses.—When facts and circumstances are pleaded in mitigation of damages, it is requisite that: First, the facts and circumstances must be such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief in the truth of such charge; second, it must also appear that the defendant, before and at the time of making the charge, knew such facts and circumstances; and, third, that he was, by reason of the facts and circumstances so set forth, induced to believe in the truth of the charge: Townshend on Sland. and Lib. 445. Mitigating circumstances set up in an answer in an action for libel, are not a defense within the meaning of the code, which requires a pleading to be made definite and certain: *Maretzek v. Cauldwell*, 19 Abb. Pr. 35; see *Wilson v. Fitch*, 41 Cal. 379; *Lick v. Owen*, 47 Id. 258.

13. Mitigation—Allegation of Republication of Matter as News.—And in mitigation of damages to which the plaintiff might otherwise appear entitled by reason of the publication of the said supposed libelous article this defendant alleges that all the matters and things stated under the [second] defense were, on the day of, 18.., at, currently reported and believed in, and were published in a certain newspaper, called the,

published in, and were so communicated to this defendant, and were published by him as matters of current public news, the defendant verily believing the same to be true: *Howard v. Raymond*, 11 Abb. Pr. 155.

14. Notice of Defense.—In some states, by statute, a notice or specification of the defense is substituted for a plea in answer. In such case the notice must contain all the material allegations of a plea or answer: *Townshend on Sland. and Lib.* 444; see 5 Ohio (N. S.) 293; 21 Pick. (Mass.) 404; 13 Johns. 475; 24 Wend. 354. Before the Code in New York, it was held that matter in justification might be given in evidence under such notice: *Baker v. Wilkins*, 3 Barb. 220. It seems that a justification, though interposed in good faith, renders the defendant liable for actual damages occasioned by the repetition of the defamatory matter in his answer if not sustained by the evidence: *Fulkerson v. George*, 3 Abb. Pr. 75.

15. Notice—Form of, in Answer.—And in mitigation of any damages to which the plaintiff might otherwise appear entitled, by reason of the publication of said supposed libelous article, this defendant repeats and renews, all and singular, the matters stated under the [second] defense herein, and will give in evidence thereof, in mitigation of damages, as well as in justification: *Howard v. Raymond*, 11 Abb. Pr. 155.

16. Plea in Bar.—It was held in New York that a plea in bar must answer the whole count, but that one plea might state several defenses to different parts: *Cooper v. Greeley*, 1 Den. 365; and see *Ames v. Hazard*, 6 R. I. 335. And that a plea might apply to part of a libel, see *Spencer v. Southwick*, 11 Johns. 573. So, if the matter is divisible: *Edwards v. Bell*, 1 Bing. 403; *Cooper v. Lawson*, 1 Perr. & D. 15; *O'Connell v. Mansfield*, 9 Irish Law R. 179; *Torrey v. Fields*, 10 Vt. 353.

17. Proof in Mitigation.—As to what facts may be proven in mitigation of damages, in an action for libel, see *Stanley v. Webb*, 21 Barb. 148; *Heaton v. Wright*, 10 How. Pr. 79; *Brown v. Orvis*, 6 Id. 376; *Hamer v. McFarlin*, 4 Den. 509; *Graham v. Stone*, 6 How. Pr. 15; *Snyder v. Andrews*, 6 Barb. 43. The reply by plaintiff, immediately after the defendant uttered the slanderous words, may be proved by defendant: *Bradley v. Gardner*, 10 Cal. 371.

18. Specific Denial.—The answer in an action, before the amendment of the code dispensing with a reply, except in certain cases, averred the truth of the libel sued on; and the reply controverted specific allegations in the answer, and then concluded with a general denial of all matters in the answer not particularly referred to: *Held*, that the denial was sufficiently specific, and that the issue was the truth of the publication, and the burden was on the defendant: *Hunt v. Bennett*, 4 E. D. Smith, 647.

No. 720.

ii. *Justification—Truth of Publication, when the Charge is Specific.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the charge, and supposed defamatory words in the complaint set forth, are each and all of them true.

No. 721.

iii. *The Same—When the Charge is General.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That on the.....day of....., 187..., at....., the plaintiff stole from [the defendant one bale of hay], to which the defendant referred when speaking [or printing, or writing] the words stated in the complaint.

19. Form.—The above form is from the report of the Code Commissioners of New York, p. 147. In a defense pleaded in an action for libel, that the charges contained in the alleged libelous publication were true, such matter is not new matter, within the meaning of the code: *Maretzek v. Cauldwell*, 19 Abb. Pr. 35.

20. Truth of Publication.—Truth, as a defense, must be set up by plea or answer: *Manning v. Clement*, 7 Bing. 367; 2 Greenl. Ev. 424. It is an issuable plea: *Woodward v. Andrews*, 1 Brev. 310. And may be set up, although the power to punish him may be barred by limitation: *Van Antin v. Westfall*, 14 Johns. 234. Or, although the plaintiff has been tried upon the charge and acquitted: *Cooke v. Field*, 3 Esp. 133; or pardoned: *Baume v. Clause*, 5 Hill, 196.

21. Truth, how Pleased.—Where the defamatory charge is in general terms, it is not sufficient to set up the answer merely that such charge is true: *Van Wyck v. Guthrie*, 4 Duer. 268; *Holmes v. Catesby*, 1 Taunt. 543. But facts must be stated showing that it is true: *Annibal v. Hunter*, 6 How. Pr. 255; *Sayles v. Worden*, Id. 84; *Lewis v. Kendall*, Id. 59; *Buddington v. Davis*, Id. 401; *Steinman v. Clark*, 2 Abb. Pr. 407, 10 Abb. Pr. 132; *Fry v. Bennett*, 5 Sandf. 69; *Lawton v. Hunt*, 4 Rich. 258; *Billings v. Waller*, 28 How. Pr. 97. Where the charge is specific, it is sufficient to allege that the charge is true: *Van Wyck v. Guthrie*, 4 Duer, 268; see, also, 1 Rolle. Abr. 87; 1 Stark. on Sland. 478; Townshend on Sland and Lib. 438. Where the facts are required to be alleged, they must be stated with certainty: Id.; *Van Ness v. Hamilton*, 19 Johns. 349; *Riggs v. Denniston*, 3 Johns. Cas. 198. So, to justify a charge of crime, the plea or answer must specify the crime with certainty: *Nall v. Hill*, Peck. 325.

22. Truth—Insufficient Defense.—An averment that it was generally reported that plaintiff had been guilty of the crime charged upon him by the words complained of, is irrelevant as a defense, and will be stricken out on motion: *Van Benschoten v. Yapple*, 13 How. Pr. 97; see, also, *Graham v. Stone*, 6 Id. 15. As to what matters may be given in evidence in mitigation, without being pleaded, see *Harter v. Crill*, 33 Barb. 283.

23. Truth and Mitigating Circumstances.—The defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances: See Cal. Code C. P., sec. 461; Laws of Oregon, sec. 89; Code of New York, Ed. 1877, sec. 535.

*No. 722.**iv. Justification and Denial of Malice, in Charge of Larceny.*

[TITLE.]

The defendant answers to the complaint:

I. That each and every article in the complaint mentioned as having been charged by defendant to have been stolen by the plaintiff, had, at the time mentioned in the complaint, been taken and stolen from the defendant.

II. That the defendant is informed and believes that the plaintiff has been, and is, guilty of each and every charge in said complaint alleged to have been made against her by the defendant, and that, whatever the defendant has said of or concerning the plaintiff, she has said in the full belief of its truth and verity, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff.

24. Rights of Parties.—No man is at liberty to trifle with the character of another, by publishing charges against him calculated to bring him into general contempt, and then to justify himself by stating his authority, and proving his statement: *Romayne v. Duane*, 3 Wash. C. Ct. 246. For what is a justification, and how it should be pleaded, see *Kerr v. Force*, 3 Cranch C. Ct. 8. The above form is sustained by *Steinman v. Clark*, 10 Abb. Pr. 132.

*No. 723.**v. Answer—Setting up a Defense and Mitigating Circumstances.*

[TITLE.]

The defendant answers to the complaint:

First. For a defense:

That the publication complained of was true. [If the alleged libel was not specific in its charges, state the facts upon which it was founded.]

Second. As mitigating circumstances:

I. That on the day of, 187..., the plaintiff accused one B. C. of burglary at

II. That thereupon an officer of the police of took the said B. C. into custody, and conducted him to a station-house.

III. That while at the station-house, the said B. C. made to the captain of police there in command a statement, which is fairly and truly reported in the publication complained of [or made a statement to the effect that the robbery with which he was charged was planned by the plaintiff, and was effected by him and the plaintiff in concert, that

they quarrelled over the division of the plunder, and that thereupon the plaintiff charged him with the felony.

IV. That afterwards the plaintiff was arrested by a police officer, and conveyed before J. P., a police justice of the City of....., and held to bail by the said justice, to answer the charges of the said B. C.

V. That the publication complained of contained a fair and true statement of the preceding circumstances.

VI. That it was published in a newspaper belonging to the defendant, by his employees, without his knowledge or consent.

VII. That the persons publishing it inserted it as an item of public news, without malice, believing the same to be true.

25. Note.—This form and the three following are from the Form Book of the Code Commissioners of New York.

No. 724.

vi. *Privileged Publication.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the....day of....., 187., at....., an action was tried in the.....Court of....., in whichwas plaintiff, and the plaintiff herein was defendant [or an indictment having been found against the plaintiff for....., he was tried therefor in the.....Court; or otherwise, as the case may be].

II. That the article published in the defendant's newspaper, mentioned in the complaint, was a fair and true report of the testimony of one of the witnesses, named, made in the course of the said trial.

26. Legal Proceedings.—Words spoken or written in a legal proceeding, and material to the controversy, are privileged. No action will lie upon them, and it is not necessary for the defendant to deny the allegation of malice: *Garr v. Selden*, 4 N. Y. 91; and see *Suydam v. Moffat*, 1 Sandf. 459; *Buddington v. Davis*, 6 How. Pr. 401. For other cases of privileged communication, see *ante*, vol. 1, p. 567, par. 18.

No. 725.

vii. *Privileged Communication—Another Form.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time of publishing the words mentioned in

the complaint, an action was pending in the..... Court, between [the parties to this action].

II. That at that time this defendant applied to B. C., the judge of the said Court, for an order of....., and upon his application presented to the said judge an affidavit containing the words complained of, which said affidavit was pertinent to the said application.

III. That the defendant did not in any other way publish the said words.

No. 726.

viii. *The Same—Another Form.*

[TITLE.]

The defendant answers to the complaint, and alleges :

I. That he was, at the time of uttering the words mentioned in the complaint, the [confidential clerk] of.....

II. That the saidinquired of the defendant the character of the plaintiff, with a view of employing him as a clerk [or as the case may be], and the defendant then stated to him the matter referred to in the complaint.

III. That the defendant had probable cause for believing, and did believe, the same to be true.

CHAPTER IV.

INJURIES CAUSED BY NEGLIGENCE.

No. 727.

i. *Denial of Ownership and Possession.*

[TITLE.]

The defendant answers to the complaint, and alleges :

That at the time of the grievance alleged the defendant was not the owner, and had not the possession or control of the premises in which said hole or hatchway was. [Or, that the said horse and carriage alleged to have been injured were not the property of the plaintiff.]

No. 728.

ii. *Plaintiff's Own Negligence.*

[TITLE.]

The defendant answers to the complaint, and alleges :

That the defendant and his servants used due care and diligence about the construction of the said building [or in

repairing said street, and replacing the pavement thereof; or, in guarding the said excavation with proper bulwarks, and in putting up lights during the night-time; or otherwise, according to the allegations in the complaint], and that said injury was not caused by any negligence on the part of the defendant or his servants, but was owing to the negligence and fault of the plaintiff himself.

1. General Denial.—In an action for damages for negligence it is not necessary that the answer should aver that the plaintiff's negligence contributed to the injury, in order to enable defendant to offer evidence of that fact. It may be shown, under a general denial of the plaintiff's charge, that the injury was caused by the defendant's negligence: *MacDonnell v. Buffum*, 31 How. Pr. 154.

2. Concurrent Negligence.—If, in an action brought by a laborer against his employer, to recover damages for an injury sustained by the employer's carelessness, the employer relies for a defense upon the fact that such injuries were caused by the negligence or improper conduct of a fellow-servant, an averment to that effect should be made in the answer. An averment that the plaintiff's injury was caused by his own negligence, does not raise the issue: *Conlin v. S. F. & S. J. R. R. Co.*, 36 Cal. 404. *Query*, whether in action against a carrier, for injuries resulting in the death of a passenger, owing to the concurrent negligence of the carrier and a third party, the defense of concurrent negligence in the agencies producing death, if a defense at all, can be heard without being specially pleaded: *Lockhart v. Lichten-thaler*, 46 Penn. Stat. 151; consult *ante*, vol. 1, p. 608, note 32; p. 616, note 60.

No. 729.

iii. Denial of Possession of Vicious Dog.

[TITLE.]

The defendant answers to the complaint:

That he does not own the said dog, and never did; and that he was not the possessor of the said dog at the time of the grievances alleged, nor at any other time, before or since said alleged grievances.

3. General Denial.—In an action for keeping a ferocious dog, which bit the plaintiff, defendant may on general denial avail himself of want of proof that the dog was accustomed to bite: *Hogan v. Sharpe*, 7 Car. & P. 755.

No. 730.

iv. Denial of Scienter.

[TITLE.]

The defendant answers to the complaint:

That at the time of the grievances alleged the defendant did not know, and had no reason to believe, that said dog was accustomed to bite mankind, or was of a mischievous nature [or otherwise, according to the allegations of the complaint].

ANSWERS—SUBDIVISION FOURTH.

Injuries to Property.

CHAPTER I.

BAILEES.

No. 731.

Denial of Bailment.

[TITLE.]

The defendants answer to the complaint:

I. That said goods described in the complaint were not the property of the plaintiff, and were not deposited with the defendants by him or his agents.

II. That the same was the property of one A. B., to whom the possession of them belonged when this action was brought.

NOTE.—See *Beach v. Berdell*, 2 Duer, 327, where this defense was sustained.

1. **Estoppel.**—A bailee or agent cannot dispute the original title of the bailor or principal from whom he has received property: *Vosburgh v. Huntington*, 15 Abb. Pr. 254; and compare *Sund v. Seaman's Sav. Bank*, 37 Barb. 129.

2. **Hire.**—A hirer of chattels, in the absence of a special agreement, is not bound to make good their loss by fire, while in his possession, without his fault: *Story on Bailm.*, sec. 414; *Hyland v. Paul*, 33 Barb. 241.

3. **Liability.**—Although bailees without reward are liable only for gross negligence, the question of gross negligence depends in part upon the nature of the thing bailed: *Tracy v. Wood*, 3 Mason, 132. The test is to consider whether they have omitted that care which bailees without hire or mandataries of ordinary prudence usually take of property of the nature of that in question: *Id.* And liability depends upon the abuse of the thing hired, or such negligence in its use as brings responsibility upon the hirer: See *Jones on B.* 120; *Reeves v. The "Constitution," Gilp.* 579. A bailee of mining stock is not liable for a sale of the bailor's stock, if he at all times holds and keeps for the bailor an equal number of shares of equal value, and replaces whenever called upon: *Atkins v. Gamble*, 42 Cal. 86. If the bailee of personal property sell it in violation of his authority, the owner may, as a general rule, ratify the sale and demand the proceeds: *Id.*

4. **Several Defenses.**—So, in an action to recover securities pledged with defendants, the defendants, in their answer, may deny knowledge, etc., sufficient to form a belief whether the securities belonged to plaintiff; and also

aver that the securities were delivered to them by plaintiff as collateral to debts yet unpaid: *Townsend v. Platt*, 3 Abb. Pr. 325.

5. Title in Third Party.—To the general rule that a bailee will not be allowed to set up title in a third party, in an action brought by the bailor, there is an exception in the cases where the bailor's possession was obtained by fraud: *Hayden v. Davis*, 9 Cal. 573. As to the liability of a transferee of property bailed, see *Robinson v. Haas*, 40 Id. 474.

CHAPTER II.

COMMON CARRIERS.

No. 732.

i. *Denial of Being a Common Carrier.*

[TITLE.]

The defendant answers to the complaint:

That he is not now, and was not at the time mentioned in the complaint, or at any time, a common carrier.

1. Note.—Forwarders and carriers distinguished: *Place v. Union Express Co.*, 2 Hilt. 19. Forwarders remain liable as carriers so long as they retain the custody of the goods as such: *Goold v. Chapin*, 20 N. Y. 259; compare, however, *Johnson v. N. Y. Cen. R. R. Co.*, 31 Barb. 196; see *ante*, p. 37, n. 47.

No. 733.

ii. *Denial of Employment.*

[TITLE.]

The defendant answers to the complaint:

That he did not undertake nor agree to carry the said goods to, nor to deliver them there to, and that said never paid him, nor agreed to pay him, any reward for such service.

2. Negligence and Delay.—Boxes of poultry packed in ice were delivered by the plaintiff to a carrier by steamboat, and his clerk signed a receipt for them, stating their contents. The boat was delayed by fog, no attention was paid to the poultry, and it was spoiled. Plaintiffs had long sent poultry by defendant's boat, who, when delayed had often forwarded the same by rail: *Held*, that defendants were liable: *Peck v. Weeks*, 34 Conn. 145. A common carrier is not only responsible for negligence, but is an insurer against loss not occasioned by the act of God, the public enemies, or the fault of the party suffering the loss: *Bohannon v. Hammond*, 42 Cal. 227. When loss occurs the burden of proof is upon the carrier to show that it resulted from one or the other of these excepted cases: *Id.* An injury to a passenger without his fault, is *prima facie* proof of negligence on the part of the carrier: *Yeomans v. Contra Costa S. N. Co.*, 44 Id. 72.

*No. 734.*iii. *Denial of Receipt of Goods.*

[TITLE.]

The defendant answers to the complaint:

That said never delivered to him the said goods mentioned in said complaint, and that he never received the same, or any of them.

*No. 735.*iv. *Denial of Loss.*

[TITLE.]

The defendant answers to the complaint:

That he denies, on his information and belief, that said goods were lost to the said, and denies that he was negligent in and about the transporting, storing or unloading of the same.

*No. 736.*v. *That the Contract was Special.*

[TITLE.]

The defendant answers to the complaint:

That the goods mentioned in the complaint were delivered by the plaintiffs to, and received by, the defendants, upon a special contract between them, whereby it was provided that [state terms of contract].

3. Effect of Special Contract.—A common carrier may, by special contract, restrict or modify his common law liability as an insurer of goods received for transportation: *Merc. Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Meyer v. Harnden's Exp. Co.*, 24 How. Pr. 290. Or the carrier may contract that he shall have the benefit of any insurance effected by or on account of the owner: *Merc. Mut. Ins. Co. v. Calebs*, 20 N. Y. 173. The validity of an express contract between the owner of goods and a carrier, limiting the general responsibility of the latter is undoubted: *The New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. U. S. 344; *Grace v. Adams*, 100 Mass. 505; *Falkenau v. Fargo*, 55 N. Y. 642; S. C., 44 How. Pr. 325.

4. Express Company.—A receipt given by an express company, and limiting their liability at the time of the delivery of them for carriage, is not a defense in an action for the loss of such goods, unless knowledge of the contents of the receipt is brought home to the plaintiff: *Belger v. Dinsmore*, 51 Barb. 69. The Adams Express Company gave receipts for goods, "value under fifty dollars, unless otherwise herein stated:" *Held*, that this did not exempt them from liability beyond that amount for goods lost by their want of ordinary care: *Orndorff v. Adams Express Co.*, 3 Bush. 194. A parcel worth six hundred and seventy-five dollars was lost in transportation by Adams Express Company. Their agent had given a printed receipt containing a stipulation that in no event "shall the holder hereof demand beyond the sum of fifty dollars, at which the

article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured" by the company, "and so specified in this receipt." The value of the parcel was not made known to the company, and it was not specially insured: *Held*, that the company was not liable for more than fifty dollars, with interest: *Brehme v. Adams Exp. Co.*, 25 Md. 328. It seems to be the prevailing rule that although common carriers may limit their responsibility by an express contract, that they cannot do so by a mere notice, even when the notice is brought to the knowledge of the person with whom they deal, unless it is also clearly and unequivocally assented to by them: See *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212; *Blossom v. Dodd*, 43 Id. 264; *Buckland v. Adams Exp. Co.*, 97 Mass. 125; *The New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; Cal. Civil Code, sec. 2174. But he may qualify his liability by general notice as to the manner of delivery, or that information shall be given of the value of any article, if it exceeds a certain sum, and that an additional price must be paid therefor: See 2 Greenl. Ev., sec. 215; 9 Wend. 115; 6 Blatchf. 64; 45 How. Pr. 90; 45 Ga. 305; Cal. Civil Code, sec. 2176.

5. Peril Excepted.—If the defense is the operation of a peril of a class excepted, the answer should specify what the particular peril was, so that the plaintiff may meet it: *Woodworth v. McBride*, 3 Wend. 227.

6. Plaintiff's Knowledge.—Where the complaint is *ex contractu*, and does not allege prepayment, an allegation that the plaintiff had notice of the condition on which the defendant received them, and delivered them with knowledge of it, is enough: *Wyld v. Pickford*, 8 Mees. & W. 443.

7. Title to Goods.—The master of a vessel is entitled to prove that the goods which he failed to deliver at a certain place according to agreement, belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of such goods by fraud: *Hayden v. Davis*, 9 Cal. 573.

No. 737.

Damage by Plaintiff's Fault.

[TITLE.]

The defendant answers to the complaint:

I. That the goods mentioned in the complaint were a dangerous and explosive substance known as nitro-glycerine, which the plaintiff then well knew, but which the defendant did not know, and could not reasonably be expected to know.

II. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in with other goods, casks and boxes, without danger or injury.

III. [State special contract, if any, which was thereby violated].

CHAPTER III.

BY AGENTS, EMPLOYEES AND OTHERS.

*No. 738.*i. *Denial of Negligence in Sale.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That he was not negligent in and about selling said goods, but sold the same with due diligence, and for as large a price as he could obtain.

1. **Factor.**—A factor whose discretion in making sales is not limited by instructions, is not, by selling forthwith, made liable for misfeasance, where it appears that he acted in consonance with the general opinion of dealers in the article at the time: *Millbank v. Dennistoun*, 10 Bosw. 382.

*No. 739.*ii. *Denial of Negligence in Giving Credit.*

[TITLE.]

The defendant answers to the complaint:

That he sold said goods to one A. B., who was a merchant at, in good standing and credit, for the sum ofdollars; and for the payment of said sum he took the bill of the said A. B., drawn on and accepted by one C. D., payable inmonths after date, which bill was at the time held and considered an approved bill.

*No. 740.*iii. *Denial of Injury.*

[TITLE.]

The defendant answers to the complaint:

That said dog did not kill the sheep alleged, or any one of them, nor did he injure or worry them, or any of them.

*No. 741.*iv. *The Same—Collision on Highway.*

[TITLE.]

The defendant answers to the complaint:

That at the time mentioned in the complaint, the defendant was driving his said carriage in the highway, and the horse of the plaintiff, being at the same time there, was so carelessly, negligently and improperly managed by the

plaintiff, that by reason thereof the carriage of the defendant, without any fault on the part of the defendant, and by want of due care in the management of his horse by the plaintiff, was driven against said horse, and thereby said horse sustained the injury alleged; and that if any damage happened to said horse it was caused by such accident, and not by the fault of the defendant.

2. Excuse.—In a case of collision between a steamer and a sailing vessel, matter of excuse on the part of the steamboat must be set forth clearly in the answer of the claimants, and must be proved as laid: *The "Washington Irving,"* Abb. Adm. 336. He who avers a fact in excuse for his own malfeasance must prove it: *Finn v. Vallejo Street Wharf Co.,* 7 Cal. 253. In a collision cause, the defendant cannot rely on a simple negative, but must state the circumstances relating to the collision: *The "Why Not,"* Law Rep. 2 Adm. and Ecc. 265.

3. General Denial.—In an action for injury to property, alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer denying every allegation in the complaint puts in issue the defendant's liability; and it is not necessary to aver that the injury was done by other persons, who were responsible therefor, and not the defendant: *Schular v. Hudson River R. R. Co.,* 38 Barb. 653.

4. General Issue.—In an action for damages for diversion of water of plaintiff's, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action: *Humphreys v. McCall,* 9 Cal. 59. That the overflow or leakage was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants open their case: *Jackson v. F. R. Water Co.,* 14 Cal. 18.

5. Injury by Dam.—The want of reasonable care on the part of another who is injured by the breaking of a dam cannot be set up in defense to an action for damages for the injuries thus suffered: *Fraler v. Sears Union Water Co.,* 12 Cal. 555.

6. Negligence of Plaintiff.—In an action for negligence, the plaintiff cannot recover if his own or his agent's negligence contributed to the injury complained of: 20 N. Y. 68; 32 Barb. 657; 33 Barb. 429; 36 Barb. 230; *Cox v. Westchester Turnpike Co.,* 33 Id. 414. So, where the plaintiff left his horse feeding on a narrow wharf, from which the horse was thrown into the water from a collision: *Morris v. Phelps,* 2 Hilt. 38; citing 21 Wend. 615; 19 Id. 399; 2 Hall, 151; 12 Pick. 177; 2 Id. 621; see, also, 24 N. Y. 430; 8 Com. Bench (N. S.), 572; 10 Bosw. 216. The owner of a cow, who suffers her to go at large, on the public street of a city, on a railroad track, at a time when cars are passing, with no one to take charge of her, in the absence of gross negligence on the part of the railroad, cannot recover for injuries to the cow: 4 N. Y. 349; 13 Id. 42; 2 E. D. Smith, 257; *Bowman v. Troy and Boston R. R. Co.,* 37 Barb. 516. Of negligence on the part of the plaintiff and the burden of showing and disproving it, see *Williams v. O'Keefe,* 24 How. Pr. 16; *Erast*

v. *Hudson River R. R. Co.*, Id. 97; reversing 32 Barb. 159; 19 How. Pr. 205. For mutual, co-operating negligence, see *ante*, vol. 1, p. 608, note 32; see, also, *Thomas v. Kenyon*, 1 Daly, 132. But a negligent act or omission of the plaintiff is not ground for defense, unless it contributes to produce the injury complained of: *Haley v. Earle*, 30 N. Y. 208. It must be the proximate cause of the injury: 37 Cal. 490; 40 Id. 14. Proximate cause means negligence at the time the injury happened: 37 Id. 409; 40 Id. 121; see, also, 40 Id. 188, 447, 532; 41 Id. 109.

CHAPTER IV.

SLANDER OF TITLE.

No. 742.

i. *Slander of Title.*

[TITLE.]

The defendant answers to the complaint:

I. The defendant avers that the words charged in the complaint to have been spoken, and each of them, were and are true.

II. Defendant denies that, by the words alleged in the complaint to have been spoken by him, the plaintiff was injured in any manner, or to any amount whatever.

III. And the defendant denies that the said words were uttered maliciously.

CHAPTER V.

TRESPASS.

No. 743.

i. *Trespass on Land—Denial of Plaintiff's Title.*

[TITLE.]

The defendant answers to the complaint:

That the said dwelling house [or land] was not the plaintiff's as alleged, or at all.

I. General Issue.—In an action for trespass or trespass on the case, what is put in issue by the general issue, see *Richardson v. City of Boston*, 19 How. U. S. 263; *Goddard v. Davis*, 1 Cranch C. Ct. 33; *Hogan v. Brown*, Id. 75; *Pancoast v. Barry*, Id. 176. Any matter done by virtue of a warrant must be specially pleaded: Co. Lit. 282; 13 Johns. 443; *Martin v. Clark*, Hempst. U. S. 259. The defendant may prove under a general denial that a tenant of the plaintiff was in the actual possession: *Uttendorffer v. Saegers*, 50 Cal. 496.

Where the defendant is in the adverse possession, trespass will not lie: *Raffetto v. Fiori*, Id. 363.

2. Title in Defendant.—In an action for damages for an unlawful entry on plaintiff's premises, an answer setting up title in defendant, and that the plaintiff had by issuing an injunction deprived defendant of possession: *Held*, under the circumstances, sufficient to make out a counter-claim: *Ashley v. Marshall*, 29 N. Y. 494. In trespass on land, plaintiff's title is not put in issue by a general denial: *Richardson v. City of Boston*, 19 How. U. S. 263; *Squires v. Seward*, 16 How. Pr. 478; *Althaus v. Rice*, 4 E. D. Smith, 348; see *Ferris v. Brown*, 3 Barb. 105. A plaintiff who recovers in trespass *quare clausum fregit*, does not thereby become invested with the title, or succeed to the interest which the defendant may have had in the property: *Williams v. Sutton*, 43 Cal. 65.

No. 744.

ii. Denial of Plaintiff's Possession.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not possessed of the lands mentioned in the complaint, or any part thereof.

3. Denial of Damage.—In an action of trespass, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage: *Rowe v. Bradley*, 12 Cal. 226.

4. Insufficient Defense.—In trespass *quare clausum fregit*, the defense that the act complained of was not committed where the plaintiff lays it, but in another lot where defendant was justified in committing said act, is in fact only a denial of what plaintiff is bound to prove, and only amounts to the general issue, and is bad on demurrer: *Dorman v. Long*, 2 Barb. 214. In trespass *quare clausum fregit*, where the complaint avers matters of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defense: *Pico v. Colimas*, 32 Cal. 578.

5. Ownership.—If ownership is alleged and denied, the issue is immaterial: *Kissam v. Roberts*, 6 Bosw. 154. If the defendant seeks to justify the taking, by proof of ownership in a third person, he must set up in his answer, not only such property in the third person, but also connect himself with such owner, by averring that the taking was by his authority, or by virtue of process or right against such owner: Id.

6. Possession and Title must be Traversed.—In an action for trespass to lands, where the answer does not traverse the plaintiff's possession or title, he is not put to prove his title, although the land be wild and vacant: *O'Reilly v. Davies*, 4 Sandf. 722. Possession by defendant may be proved under the general issue: *Babcock v. Lamb*, 1 Cow. 238; *Saunders v. Wilson*, 15 Wend. 338.

7. Possession Insufficient Allegation.—In an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of possession, for the defendants to aver, in their

answer, that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff: *McCormick v. Baily*, 10 Cal. 230.

8. Possessory Title.—A plea of possessory title under a demise from a third person, if it did not give express color, was bad, as amounting to the general issue: *Collet v. Flinn*, 5 Cow. 466; *Underwood v. Campbell*, 13 Wend. 78.

9. Title.—In trespass *quare clausum fregit*, in a justice's court, defendant may entitle himself to a verdict by showing either title in himself, title in a third person, or possession out of the plaintiff: *Douglas v. Valentine*, 7 Johns. 273; explaining *Strong v. Smith*, 2 Cai. 28.

No. 745.

iii. *Justifying Trespass—Fences Defective.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff and defendant occupy farms contiguous to each other, and separated by a fence which the plaintiff was bound to keep in repair. The plaintiff neglected to keep the fence in repair, by means whereof the cattle of the defendant escaped over the fence and on to the premises of the plaintiff, and thereby the defendant committed, by his cattle and without his fault, the supposed injury set forth in the complaint as done by the defendant's cattle.

II. That the defendant, as soon as he had notice of the escape of his cattle, entered upon the plaintiff's premises to, and did, drive them out, doing no unnecessary damage, which is the alleged trespass committed by the defendant, and set forth in the complaint.

10. Cattle.—That the fence through which the cattle entered, and which the plaintiff was bound to keep in repair, was defective, may be shown by the defendant: *Colden v. Eldred*, 15 Johns. 220.

No. 746.

iv. *Justification of Rebuilding Fence.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the fence mentioned in the complaint was a part of the division-fence upon the line between the lands of the plaintiff and of the defendant, which, by a previous agreement, between them, the defendant was bound to make, and keep in repair.

II. That he took up and removed the part of said fence

which he was bound to repair, and replaced the same with a new fence upon the said division line, and with as little injury as possible to the plaintiff's crops, as he had full right to do; which are the acts complained of.

11. Easement.—When the act appears to be, *prima facie*, a trespass, any matter of justification, by virtue of any authority or easement, must be pleaded: *Babcock v. Lamb*, 1 Cow. 238; *Saunders v. Wilson*, 15 Wend. 338. In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land, contains no defense: *Pico v. Colimas*, 32 Cal. 578.

No. 747.

v. *Leave and License.*

[TITLE.]

The defendant answers to the complaint:

That the acts complained of were done by leave of the plaintiff.

12. License.—License to enter on the premises of another must be specially pleaded: *Haight v. Badgeley*, 15 Barb. 499; *Beatty v. Swarthout*, 32 Barb. 293. But entering under a void license is a trespass: *Chandler v. Edson*, 9 Johns. 362.

13. Mineral Lands.—Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: 1. That the land is public land; 2. That it contains mines or minerals; 3. That he enters for the *bona fide* purpose of mining; and such justification must be affirmatively pleaded in the answer, with all the requisite averments, to show a right, under the statute or by law, to enter: *Lentz v. Victor*, 17 Cal. 271.

14. Statute, how Pleased.—In an action for damages for an alleged trespass upon the plaintiff's land, if the defendant justifies the alleged trespass under the act in relation to laying out and establishing roads, he must, in his answer, show a strict compliance with all the provisions of the statute: *Sherman v. Buick*, 32 Cal. 241.

No. 748.

i. *Trespass on Chattels—Denial of Right of Possession.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not entitled to the possession of the goods mentioned in the complaint.

No. 749.

ii. *The Same—Denial of Breaking.*

[TITLE.]

The defendant answers to the complaint:

That the defendant did not break nor enter the premises of the plaintiff, as alleged, or in any other manner.

*No. 750.*iii. *The Same—Denial of Taking.*

[TITLE.]

The defendant answers to the complaint:

That he did not take nor carry away said goods, as alleged, or at all.

15. Essential Averments.—An answer justifying a trespass on the ground of official duty, should aver that defendant is an officer, and what his official duty is, and, if there are many defendants, it should state they entered in aid of the officer: *Pico v. Colimas*, 32 Cal. 578. An answer justifying a seizure under a writ of attachment does not state facts constituting a defense, if it fails to allege that defendant in the attachment suit was the owner of the property: *Richardson v. Smith*, 29 Cal. 529; *Richardson v. Hall*, 21 Md. 399. In an answer justifying seizure under execution, defendant should not only set out the execution, but the judgment on which it is founded, and that he is an officer, properly acting under such execution: *McDonald v. Prescott*, 2 Nev. 109.

16. Facts must be set up.—It may be laid down as a general rule that the facts constituting the justification must be fully set up: *McComb v. Reed*, 28 Cal. 281; *Towdy v. Ellis*, 22 Cal. 659; *Knox v. Marshall*, 19 Cal. 617; *Killey v. Scannell*, 12 Cal. 73. Nor can this justification be made by a general denial of the allegations of the complaint: *Glazier v. Clift*, 10 Cal. 303.

17. Forfeitures.—A plea alleging a seizure for a forfeiture as a justification to an action of trespass, should not only state the facts which are relied on to establish a forfeiture, but should also aver directly that by reason thereof the property became and actually was forfeited, and was seized as forfeited: *Gelston v. Hoyt*, 3 Wheat. 246.

18. General Denial—Trespass.—In an action for damages for trespass, under a mere denial, defendant may show that the article destroyed or injured was worthless: *Dunlap v. Snyder*, 17 Barb. 561.

*No. 751.*v. *Justifying Trespass, by Virtue of Requisition of Claim and Delivery.*

[TITLE.]

The defendant answers to the complaint:

I. That at the times mentioned in the complaint the defendant was Sheriff of the County of, in this State, duly elected and qualified as such.

II. That in an action brought by one M. N. against one O. P., in the Court of, to recover the possession [among other things] of the property mentioned in the complaint in this action, said M. N. delivered to this defendant an affidavit made by him [or made in his behalf], and a notice indorsed thereon, describing the property mentioned in the complaint, and requiring this defendant

to take the same from said O. P., and deliver it to said M. N.; and at the same time delivered to this defendant, as such sheriff, a written undertaking as required by law in such case, of which affidavit, notice, and undertaking, copies are hereto annexed as a part of this answer.

III. That by virtue of said proceedings the defendant took and detained the goods mentioned in the complaint, which are the acts of which the plaintiff complains.

19. **Form.**—This form is from Abbotts' Forms, No. 963.

20. **What must be Shown.**—A plea justifying the taking upon a writ of replevin, must show the execution and delivery to him of the replevin bond and affidavit with the writ: *Morris v. Van Voast*, 19 Wend. 283. That a writ of replevin may be pleaded in justification, and the distinction between such a writ and an execution defined, in *Foster v. Pettibone*, 20 Barb. 350; disapproving *Stimpson v. Reynolds*, 14 Id. 506.

No. 752.

v. *Justification under Execution.*

[TITLE.]

The defendant answers to the complaint:

I. That at the time mentioned in the complaint, the defendant was Sheriff of the County of, in this State, duly elected and qualified as such.

II. That heretofore, in an action in [state the court], wherein A. B. was plaintiff, and C. D., the plaintiff herein, was defendant, judgment was, on the day of, 187 . . ., rendered in favor of the said A. B., plaintiff in said action, against the said C. D., defendant therein, for the sum of dollars, as by the judgment-roll in said action, on file in the office of the County Clerk of said County, more fully appears.

III. That afterwards, on the day of, 187 . . ., execution against the property of C. D., based upon such judgment, was issued, and directed to and delivered to this defendant, as Sheriff of the said City and County of, for service; whereby, after containing the statement and recital of the matters by law required to be stated and set forth in such case, and after setting forth that the sum of dollars was then actually due on the said judgment, this defendant was in substance commanded to satisfy the said judgment out of the personal property of the said judgment-debtor within this defendant's county; or, if sufficient

personal property could not be found, then out of the real property in his county belonging to such judgment-debtor, and to return the said execution within sixty days after its receipt by him, as required by law.

IV. That under and by virtue of the said execution, this defendant, as Sheriff of the City and County of, and not otherwise, levied upon certain goods and chattels, of the character and description of those mentioned and described in the complaint, and took the same into his custody, which defendant believes to be the goods and chattels referred to in the complaint, and that the said levy and taking and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged.

V. And this defendant, upon his information and belief, avers that the goods levied on as aforesaid were at the time of said levy the property of the said C. D.

21. Note.—In the case of an execution, the sheriff must take only the property of the defendant: *Foster v. Pettibone*, 20 Barb. 361.

No. 753.

vi. *Justification of Breaking Plaintiff's House by Virtue of Search-warrant.* [TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned in the complaint, one A. B. was a Justice of the Peace of the Town of, in the County of, and was authorized to issue and did issue a warrant in writing, under his hand and seal, directed to any Constable of the said Town, reciting that whereas information on oath had been given to him, the said A. B., a Justice of the Peace as aforesaid, by one C. D., of, that [specify the goods] had lately been feloniously taken and carried away by E. F., from, etc., and that the said [goods], or a part thereof, were then concealed in a cellar of L. M., at; and the said Justice did, in and by the said warrant, in the name of the people of this State, command and authorize them, the said Constables, or any of them, with proper assistance, in the day-time, to enter into the cellar of the said L. M., at, and there diligently search for the said [goods], and if the same, or any part thereof, should be found, then the said Constables were, in and by the said warrant, likewise com-

manded to bring the same so found, together with the said L. M., or the person in whose custody the same should be found, before him, the said Justice, or some other Justice of the Peace of said Town, etc., to be dealt with as the law directs.

II. That said warrant was delivered to G. H., one of the defendants, who then was one of the constables of the said Town, to be executed according to law, by virtue of which he went to the cellar of the said L. M. mentioned in the warrant, and which was part and parcel of and belonged to the dwelling-house mentioned in the complaint, and there finding the door thereof shut and fastened, did, in a friendly and peaceable manner, demand and require that the said door should be opened, which was then and there refused; and that thereupon the said G. H., one of the defendants, in order to execute the said warrant, did break open the said door, doing as little damage as possible, and did search there for said [goods], and took and carried away therefrom [specify the goods], being part of the said [goods] mentioned in the said warrant, and brought the same before the said Justice, as he might lawfully do, which are the acts of which the plaintiff complains.

22. Form.—This form is in substance from Abbotts' Forms, No. 999, and is sustained by *Bell v. Clapp*, 10 Johns. 263.

FORMS OF ANSWERS—SUBDIVISION FIFTH.

For the Possession of Specific Property.

CHAPTER I.

FOR PERSONAL PROPERTY.

No. 754.

i. *Conversion—Denial of Plaintiff's Ownership.*

[TITLE.]

The defendant answers to the complaint, and denies that at the time of the alleged conversion, the plaintiff was the owner, or entitled to the possession of the goods, wares, and merchandise, mentioned in the complaint, or any of them.

1. Property of Decedent.—In an action by an administrator against a person claiming to hold the decedent's property by virtue of a gift or transfer from the decedent, if the defendant in his answer denies that the plaintiff's intestate at the time of his death owned or was in possession of the property, he may on the trial claim or establish a title to the property, by gift from the intestate; especially after the plaintiff has himself proved that the defendant had claimed the property as such: *Woodruff v. Cook*, 25 Barb. 505.

No. 755.

ii. *The Same—Denial of Bailment.*

[TITLE.]

The defendant answers to the complaint, that the defendant never received the plaintiff's goods mentioned in the complaint, as bailee, as alleged, or at all.

2. Issuable Fact.—Whatever is the allegation of a complaint showing that defendant received possession, is issuable: *Elton v. Markham*, 20 Barb. 343.

No. 756.

iii. *The Same—Lien upon Goods Detained.*

[TITLE.]

I. That on the....day of....., 187., the plaintiff deposited the goods mentioned in the complaint with the defendant, for storage, agreeing to pay for the same [one dollar] per [ton] per [month].

II. That the defendant has always been, and still is,

ready and willing to deliver the said goods to the plaintiff, upon the payment of the storage-money due.

III. That the plaintiff has not paid, or tendered to the defendant the storage-money due.

3. Warehouseman.—A person who is not engaged in warehousing as a business, has no lien for his compensation for the chattels kept by him on storage: 3 E. D. Smith, 267; *Alt v. Weidenberg*, 6 Bosw. 176.

No. 757.

iv. *The Same—Lien for Services.*

[TITLE]

The defendant answers to the complaint, and alleges:

I. That said goods were manufactured by the defendant, as tailor, and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of.....dollars, which is the amount due him from the plaintiff for work and labor in manufacturing them.

II. That defendant has always been and still is ready and willing to deliver the said goods to the plaintiff, upon receiving the said amount.

III. That the plaintiff has not paid or tendered to the defendant the said amount of.....dollars due thereon.

NOTE.—See Cal. Civ. Code, sec. 3051.

4. Former Recovery.—A plea of former recovery, in an action based on a wrongful sale of property, must show that the cause of action in the former suit was identical with the sale: *Hopkinson v. Shelton*, 37 Ala. 306.

5. General Denial.—Under the New York code it has been held, in a suit for conversion of property, a denial of each and every allegation of the complaint puts in issue the conversion and plaintiff's title: *Robinson v. Frost*, 14 Barb. 536; but see *Ely v. Ehle*, 3 Coms. 510; *Jacobs v. Remson*, 12 Abb. Pr. 390; *Beaty v. Swarthout*, 32 Barb. 293; *Davis v. Hoppock*, 6 Duer, 256; *Heine v. Anderson*, 2 Id. 318; *Gorham v. Cary*, 1 Abb. Pr. 285.

6. Justification by Officer.—Where an officer justifies under an execution issued by a justice, his pleading must show that the justice had jurisdiction of the cause: *Cleveland v. Rogers*, 6 Wend. 438. An officer having made a proper levy cannot be sued in trover by the debtor, for a part of the goods which was not sold, without proving a demand that he redeliver them, and a refusal: *Seaman v. Luce*, 23 Barb. 240.

7. Plaintiff Regaining Possession.—The fact that the plaintiff has regained possession before suit brought is no defense to an action for the conversion: *Murray v. Burling*, 10 Johns. 172; *Kerr v. Mount*, 28 N. Y. 659. It only goes to the mitigation of damages: *Reynolds v. Shuler*, 5 Cow. 323; *Connah v. Hale*, 23 Wend. 462.

8. Principal and Agent.—An action brought by an agent in his own

name, for a trespass in converting coin, in which the jury found that the coin belonged to the principal; such action is no bar to an action by the principal for the coin: *Pico v. Webster*, 12 Cal. 140.

9. **Replevin, when a Bar.**—Plaintiff brought an action of replevin to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought an action in trover to recover the value, defendants pleaded the former recovery as a bar to the action of trover, the judgment in replevin not being satisfied: *Held*, that the judgment in replevin did not constitute a bar to the action in trover: *Nickerson v. Cal. Stage Co.*, 10 Cal. 520.

10. **Title in Another.**—Where, in an action for conversion, the issue under the pleadings is whether the plaintiff at the time of the conversion owned the property, and as owner was entitled to immediate possession, according to the allegation of his complaint, the defendant has a right to prove that the legal title was at the time vested in a third person, and that the plaintiff was not in possession, the above allegation not being a mere conclusion of law from facts previously stated, but the affirmation of a fact: *Davis v. Hoppock*, 6 Duer, 254. A sheriff may justify in this form of action, by showing want of title in the plaintiff: *Rinchey v. Stryker*, 28 N. Y. 45; 26 How. Pr. 75; *Hall v. Stryker*, 27 N. Y. 596. In an action for wrongfully taking personal property, the answer alleged that the defendant took the property as constable, under an execution against a third party, in whose possession it was, but did not rebut the allegation that it was the property of the plaintiff. The answer was properly stricken out: *Barley v. Cannon*, 17 Mo. 595.

11. **Value.**—In an action in the nature of trover, the usual averment in the complaint of the value of the property converted is not traversable matter. The defendant cannot take issue upon it; and his omission to answer it does not admit its truth. Hence, where the answer does not deny the averment of value, the plaintiff must, notwithstanding, prove the amount of his damages: *Connoss v. Meir*, 2 E. D. Smith, 314. In trover, trespass, or replevin, it is not necessary to deny the value or the damages alleged in the complaint. So held in Wisconsin: *Jenkins v. Steanka*, 19 Wis. 126. In an action for the conversion of chattels, alleged by the plaintiff to be of a certain value, defendant denied that they were of such value, or of any greater value than a certain less sum named: *Held*, an admission that they were worth the less sum named: *Carlyon v. Lannan*, 4 Nev. 156. For the measure of damages in California, see Civil Code, sec. 3336; also, *Tully v. Harloe*, 35 Cal. 302; *Hisler v. Carr*, 34 Id. 641; *Atherton v. Fowler*, 46 Id. 323. Instance of erroneous judgments for, see *Cummings v. Stewart*, 42 Id. 230.

No. 758.

i. Claim and Delivery.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff, at the time stated in the complaint, or ever, or at all, was in possession of the goods described in the complaint, or any of them.

II. Denies that said goods, or any of them, are or ever were the property of the plaintiff.

III. Denies that said goods are or were, at the time alleged, or at any time since, of the value of dollars, or any amount greater than dollars.

12. Another Action Pending.—In an action against a constable to recover possession of personal property taken under attachment, the pendency of another suit for the same goods by the plaintiff's vendor is no defense: *O'Connor v. Blake*, 29 Cal. 312. A pleading by a defendant, in an action of replevin, which admits the taking complained of, but justifies under legal process, and prays judgment, restitution of the property replevied, or for its value, contains only matter of confession and avoidance, and is deemed controverted by plaintiff: *Stringer v. Davis*, 35 Cal. 25.

13. Delivery to Third Person.—If, during the pendency of an action to recover the possession of personal property, and before the trial thereof, the defendant has been required to deliver, and has delivered the property to another person entitled to its possession, as against both plaintiff and defendant, that fact may be set up in the answer, or in a supplemental answer for the purpose of defeating a recovery of the possession or of the value of the property: *Bolander v. Gentry*, 36 Cal. 105.

14. Demand.—If the defendant does not object to the sufficiency of a demand, and refuses to deliver up the property for improper reasons, a further demand will be unnecessary: *King v. Fitch*, 1 Keyes, 432. If the complaint shows that the property came rightfully to the possession of the defendant, and does not aver a demand and failure to deliver, it is fatally defective: *Campbell v. Jones*, 38 Cal. 507.

15. Fraudulent Transfer.—In an action against a sheriff, to recover the possession of personal property, it is a good defense for the sheriff to show that the defendant in the attachment, when insolvent, sold the property to the plaintiff, to defraud his creditors, with the knowledge of plaintiff, and that said defendant has since been declared a bankrupt, and the sheriff has, on demand of the assignee in bankruptcy, delivered him the goods: *Bolander v. Gentry*, 36 Cal. 105.

16. General Denial.—In an action for the claim and delivery of personal property, the denial by the defendant of the averment in the complaint of the plaintiff's title and right of possession, and of the wrongful detention, is sufficient, without a denial of an averment of the particular facts upon which his title and right of possession are claimed: *Nudd v. Thompson*, 34 Cal. 39. Evidence of a levy under an execution prior to that stated in the answer was not admissible under the general denial. If defendant had made a prior levy, and was thereby entitled to possession of the goods, it was matter to be specially pleaded: *Graham v. Harrower*, 18 How. Pr. 144. In an action to recover the possession of personal property, the defendant may set up a general denial, and also a justification: *Hackley v. Ogmun*, 10 How. Pr. 44.

17. Insufficient Denials.—Where the complaint in replevin averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was one thousand dollars; and the answer denied that on the day specified "the plaintiff was the owner and lawfully in possession,"

and, as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth one thousand dollars: *Held*, that the answer is insufficient, because it raises an immaterial issue as to time; and as to the possession of the property, that it amounts merely to a conclusion of law: *Kuhland v. Sedgwick*, 17 Cal. 123.

18. Justification.—An officer, to justify the seizure of property in possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint: *Glazer v. Clift*, 10 Cal. 303. He may plead the property to have been in possession of the defendant in the suit. In such a case, it is not necessary that the defendant should specially plead want of notice and demand in order to make such a defense: *Killey v. Scannell*, 12 Cal. 73. In an action of replevin against a sheriff, he must justify not only with the execution, but with the judgment itself, whenever he takes property which is in the possession of a stranger to the writ: *Knox v. Marshall*, 19 Cal. 617. It does not state facts constituting a defense, if it fails to allege that the defendant in the attachment suit was the owner of the property: *Richardson v. Smith*, 29 Cal. 529. It is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient: *Towdy v. Ellis*, 22 Cal. 650.

19. Non Cepit.—A plea of *non cepit* in replevin put in issue the question of general property only, and not of special property; at least in a suit between a principal and his agent. On such a plea, the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another; for a wrongful detainer after a lawful taking is not equivalent to a wrongful original taking: *Meany v. Head*, 1 Mason, 319.

20. Subsequent Proceedings.—If it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification: *Walker v. Woods*, 15 Cal. 66.

No. 759.

ii. *The Same—Title in Another than Plaintiff.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the property described in the complaint was, at the time stated therein, and still is, the property of, and not the property of the plaintiff.

21. Denial of Plaintiff's Title.—The defendant, whether he laid property in himself or in a stranger, was required to traverse property in the plaintiff: *Rogers v. Arnold*, 12 Wend. 30; *Prosser v. Woodward*, 21 Id. 205; *Curtis v. Jones*, 1 How. App. Cas. 137; 3 Den. 590; *Pringle v. Phillips*, 1 Sandf. 292.

22. Fact Denied.—In claim and delivery, the denial of the particular facts upon which the plaintiff claims title and right of possession is sufficient: *Nudd v. Thompson*, 34 Cal. 39.

23. Form.—See, as to form, *Harrison v. McIntosh*, 1 Johns. 380; *Ingraham v. Hammond*, 1 Hill, 353. When title to property is set up in a stranger, he must be named: *Anstice v. Holmes*, 3 Den. 244.

24. Literal Denials Insufficient.—If the complaint, in an action to recover the possession of personal property, avers "that the plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property:" *Richardson v. Smith*, 29 Cal. 529.

25. Prayer.—In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments: *Gould v. Scannell*, 13 Cal. 430. If the plaintiff takes the property, the defendant must claim its return in his answer, to enable the Court to give the judgment in the alternative form: *Id.*

26. Sufficient Denial.—A complaint, in an action to recover personal property, averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and, in addition, averred affirmatively that the property was, at that time, owned and possessed by a third person: *Held*, that this averment was but another form of denial, and not new matter, which, under the system of replication formerly in force, was admitted by a failure to reply: *Woodworth v. Knowlton*, 22 Cal. 164.

No. 760.

iii. *The Same—Defendant Part Owner.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That, at the several times mentioned in the complaint, the defendant was, and still is, the owner of an undivided one half of said goods, wares, and merchandise; and defendant was then, and still is, in the possession of the whole of said goods.

27. Property in Defendant.—Property is a good plea in replevin: *Dermott v. Wallach*, 1 Black, U. S. 96; but must be specially pleaded: *Dickson v. Mathers*, Hempst. U. S. 65. A plea in replevin, that the property was not in the plaintiff, is informal, but sufficient, and admits proof of property in the defendant or a stranger: *Dermott v. Wallach*, 1 Black, U. S. 96; see, also, 12 Wend. R. 30, 34, 35. The omission of a *similiter* is immaterial: *Id.* But the defendant cannot allege that the plaintiff has taken from him other property than that mentioned in the complaint, and ask or obtain judgment for its return: *Lovensohn v. Ward*, 45 Cal. 8.

CHAPTER II.

EJECTMENT.

*No. 761.*i. *Answer Containing Special Denials.*

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff is the owner of the [lots of land] described in the complaint, or any part thereof, or was ever seised or possessed of the same, or any part thereof, or entitled to the possession thereof at any time or at all.

II. Denies that the plaintiff has any estate therein, or ever had.

III. Denies that the said plaintiff has been damaged by said defendant's withholding the said premises, or the possession thereof, in the sum of.....dollars, or in any other sum, or at all.

IV. He denies that the annual value of the rents and profits of the premises described in the complaint is the sum of.....dollars, or any other or greater sum thandollars.

1. Denials Essential.—Unless the answer denies the allegations of the complaint, they are admitted without further proof, damages included: *Patterson v. Ely*, 19 Cal. 28; *McLaughlin v. Kelly*, 22 Id. 221.

2. Insufficient Answer.—The complaint charged that, on a day mentioned, the plaintiffs were lawfully seised and possessed, and had the right of possession of a certain tract of land, and the defendants afterwards entered into and upon the said tract, and ousted plaintiffs therefrom. The answer, in response to these allegations, averred that the defendant was not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof: *Held*, that the answer raised no issue: *Schenk v. Evoy*, 24 Cal. 113. This defendant further says, that he is not in possession of the lands and tenements described in the complaint, or any part thereof: *Held*, that the allegation of the complaint must be taken as confessed: *Id.*

3. Insufficient Denial.—In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put in issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of plaintiff's rights, had possession," etc. This denial might be true, and yet the defendant be in possession. The defendant was called on to answer not only the character of the possession, but the fact of possession: *Burke v. Table Mountain Co.*, 12 Cal. 403. The averments of possession and ouster, in this case,

were held to be insufficiently denied. See statement of facts: *Smith v. Doe*, 15 Cal. 100. A denial that the plaintiff has suffered damage in the exact sum claimed by him, is insufficient: *Huston v. T. & C. C. T. R. Co.*, 45 Id. 553.

4. Literal and Conjunctive.—An allegation, in a verified complaint, that “defendants wrongfully and unlawfully entered upon and dispossessed” plaintiff, is not sufficiently denied by a denial that defendants wrongfully and unlawfully entered and dispossessed plaintiff, because such denial admits entry and ouster: *Busenius v. Coffee*, 14 Cal. 91.

5. New Matter.—When a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or, confessing them, should state distinctly and positively new matter sufficient to avoid them: *Ladd v. Stevenson*, 1 Cal. 18. The defendant is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor: *Ayres v. Bensley*, 32 Cal. 620.

6. Purchase by Defendant in Ejectment.—If a defendant in ejectment, who is in possession without claim or color of title, buys a fractional interest in the demanded premises *pendente lite*, this purchase thenceforth presumptively divests his possession of its hostile character: *Carpentier v. Small*, 35 Cal. 346.

7. Right of Possession.—The defendant cannot prove on the trial of an action of ejectment, for the purpose of showing that plaintiff’s right of possession had terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or supplemental answer: *Moss v. Shear*, 30 Cal. 467. If the plaintiff has conveyed the land demanded, pending ejectment, the court, by the consent of both the plaintiff and the vendee, may, under the provisions of the practice act, make an order continuing the action in the name of the original plaintiff: *Id.* If the plaintiff in ejectment transfers the demanded premises pending the action, and the court orders the action continued in the name of the original plaintiff, he may recover judgment for both the possession and the rents and profits: *Id.* The sale and transfer by the plaintiff in ejectment of the demanded premises pending the action, is a transfer of the cause of action, within the meaning of the sixteenth section of the practice act (Cal. Code C. P., sec. 385); and the action may be continued in the name of the original plaintiff: *Id.*

8. Stare Decisis.—Where important rights of property had grown up under a decision of the supreme court, and many years have elapsed since the same was rendered, and its correctness has been tacitly admitted in other cases, the question will not be re-opened: *Vassault v. Austin*, 36 Cal. 691.

9. Sufficient Denial.—Where, in an action of ejectment, the complaint did not directly aver a seisin or ownership of the premises by plaintiff, but alleged that the plaintiff, by location, survey, and certain other acts, acquired possession; and the answer denied these acts, except the survey, and denied that plaintiff acquired possession by location, “or in any other manner:” *Held*, that the allegation of prior possession was sufficiently denied by the answer:

La Rue v. Oppenheimer, 20 Cal. 517. If the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action is not admitted by the pleading, although it is not specially denied: *Hawkins v. Reichert*, 28 Cal. 534.

10. Tax Title.—A tax title must be specially set up: *Russell v. Mann*, 22 Cal. 132. And if it accrue after action commenced, it must be pleaded in a supplemental answer: *McMinn v. O'Connor*, 27 Cal. 246; *Moss v. Shear*, 30 Cal. 468. It is not enough to allege that the property was duly sold for the non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute had been made: *Carter v. Koesley*, 9 Bosw. 583. In an action to bar the rights of a former owner of lands sold and deeded for non-payment of taxes, an answer which merely denies the validity of the taxes, or that anything was due thereon for taxes at the time of the sale, and denies the title of the plaintiff, is not sufficient. It should allege facts showing specifically the grounds relied on to avoid the tax deed: *Wakeley v. Nicholas*, 16 Wis. 588. Whenever a tax title is specially set forth in a pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions have been complied with. This necessity is not obviated by the provision making the tax deed proof of certain facts: *Russell v. Mann*, 22 Cal. 131. In pleading a tax title, it is necessary to aver those facts which by statute are required to be stated in the tax deed: *Id.* A pleading, setting up a tax title, must aver distinctly for what year the tax was assessed, and, failing to do so, is demurrable: *Id.*

11. Title in Defendant.—Title in the defendant need not be pleaded, and may be given under a denial of plaintiff's title, and if pleaded (*Marshall v. Shafter*, 32 Cal. 176) such an allegation does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff: *Id.* The defendant need not show that he has any title whatever, but may confine himself simply to rebutting the evidence of the plaintiff: *Moore v. Tice*, 22 Id. 516. An answer in an action of ejectment, where both parties claim under a common grantor, which sets up as a defense a legal title in defendant, and also a verbal contract made by plaintiff's grantor to convey, and an entry under, and a subsequent purchase by plaintiff, with notice, contains both a legal and equitable defense: *Bodley v. Ferguson*, 30 Cal. 511. A plea which sets up no title in the defendant, but alleges certain evidence or sources of title which it avers the plaintiff relies on, and states facts to show such title is invalid, is bad: *Christy v. Scott*, 14 How. U. S. 282. Where the defendant in ejectment set up title derived under a written instrument, claiming to be a conveyance, but lacking all the requisites, such a defense was insufficient against a party holding a subsequent deed from the same grantor: *Hayes v. Bona*, 7 Cal. 153.

12. Title in Third Person.—A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person: *Gregory v. Haynes*, 13 Cal. 591. The defendant may show that the title and right of possession is in some third person, except in the case of public lands, in which case this rule is qualified: *Moore v. Tice*, 22 Id. 516. A possession taken and held by the defendant for the requisite

period, in hostility to the title or claim set up by the plaintiff, amounts to an adverse possession against the plaintiff sufficient to bar a recovery, even though the defendant, while so in possession, admitted the validity of a title outstanding in a third person: *Page v. Fowler*, 28 Id. 611; *Hayes v. Martin*, 45 Id. 559; *McMannus v. O'Sullivan*, 48 Id. 15.

13. Title to Part.—An answer in ejectment, setting up title to only a portion of the demanded premises, must particularly describe the part to which title is claimed: *Anderson v. Fisk*, 36 Cal. 625. An answer in ejectment, setting up title in the defendant to the demanded premises, and possession in him, should aver that such possession and title were adverse to the plaintiff's claim of title: *Anderson v. Fisk*, 36 Cal. 625.

14. Title Terminated.—Under our Practice Act (Cal. Code C. P., sec. 740), if it appear that the plaintiff in ejectment had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession, but only his damages: *Moore v. Tice*, 22 Cal. 513. If the termination of plaintiff's title pending the action would not necessarily appear from plaintiff's proofs on the trial, the facts showing such termination should be set up by a supplemental or amended answer: See *McMinn v. O'Connor*, 27 Id. 247; *Reilly v. Lancaster*, 39 Id. 356; *Thompson v. McKay*, 41 Id. 231; *Foscalina v. Doyle*, 47 Id. 438.

No. 762.

ii. *Denial of Title.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff, at the commencement of this action, was not the owner of the premises alleged [nor entitled to possession thereof].

15. Form.—This form is only appropriate where the averment of title in the complaint is in general terms, without stating the sources of title.

No. 763.

iii. *Answer Containing Several Defenses.*

[TITLE.]

The defendant answers to the complaint:

First. For a first defense:

I. That the grant of A. B. to the plaintiff, referred to in the complaint, was delivered at a time when the land mentioned therein was in the actual possession of the defendant, claiming under a title adverse to that of said A. B.

Second. For a second defense:

I. That on the....day of....., 187..., the said A. B. executed to the defendant a deed, whereby he granted to him a piece of land [describe as in deed].

II. That by a mutual mistake of the parties thereto, the

said deed did not include the land mentioned in the complaint; but it was their intention that it should, and they, at the time of its execution, believed that it did include the same, and the defendant, in such belief, paid to the said A. B. the price thereof.

III. That this action is brought by the plaintiff to recover lands omitted from said deed by said mistake.

Wherefore defendant demands that the plaintiff be adjudged to execute to the defendant a deed of conveyance correcting said mistake, and conveying to the defendant said premises, in said agreement; and that the plaintiff be perpetually enjoined from the prosecution of this action.

NOTE.—The first defense above is good only in the states where lands held adversely are not permitted to be conveyed. It is not good in California: See Civ. Code, sec. 1047.

16. Abandonment.—An abandonment takes place only when one in possession leaves with the intention of not again resuming possession. Abandonment is, therefore, a question of intention, and should be specially pleaded, and the facts stated on which the defendant relies: *Moon v. Rollins*, 36 Cal. 333; *St. John v. Kidd*, 26 Cal. 266; *Root v. Ball*, 4 McLean, 177. That it need not be specially pleaded where the strict legal title is not in question, see *Bell v. Brown*, 22 Cal. 671; *Wilson v. Cleveland*, 30 Id. 192.

17. Abandonment, when not Pleaded.—In an action of ejectment, one of the material allegations of the complaint is, that the plaintiff was the owner and entitled to the possession at the time of the alleged entry by defendant, and under a direct denial of this averment the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment or forfeiture: *Bell v. Brown*, 22 Cal. 671. Where a right to recover is founded upon naked possession, the defendant, under the general issue, without pleading abandonment, may prove abandonment by the plaintiff before the defendant's entry: *Wilson v. Cleveland*, 30 Cal. 192. Evidence of the abandonment of a mining claim by a party suing to recover the same, is admissible without a special plea thereof, under a denial of title in the plaintiff, pleaded by the defendant: *Bell v. Bedrock T. & M. Co.*, 36 Cal. 214. Mere lapse of time does not constitute an abandonment, but it may be given in evidence for the purpose of ascertaining the intention of the parties: *Moon v. Rollins*, 36 Cal. 333.

18. Abatement—Another Action Pending.—In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions: *Larco v. Clements*, 36 Cal. 132. Answers in abatement of an action are to be strictly construed: Id.

19. Abatement by Death.—So, the death of the wife without issue, after a suit by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit: *Gee v. Moore*, 14 Cal. 472. No abatement takes place in ejectment,

except in case of sole defendant: *Adams on Ej.* 298; 2 *Tidd.* 846; *Putnam v. Van Buren*, 7 *How. Pr.* 31; *James v. Bennett*, 10 *Wend.* 540; *Hatfield v. Bushnell*, 1 *Blatch.* 393. On death of plaintiff's lessor: *Frier v. Jackson*, 8 *Johns.* 495. Of defendant: *Diefendorf v. House*, 9 *How. Pr.* 243; 18 *Wend.* 543; 4 *Cow.* 423; 4 *Ad. & E.* 1002. In real action, the death of either party before judgment abates the suit: *Macker v. Thomas*, 7 *Wheat.* 530; *Green v. Watkins*, 6 *Id.* 260; *Dyckman v. Allen*, 2 *How. Pr.* 17.

20. Abatement by Transfer of Property.—In New York, the transfer of all the interest of a sole defendant, abates the action. A new action may be maintained against the transferee: *Mosely v. Albany N. R. R. Co.*, 14 *How. Pr.* 71; *Mosely v. Mosely*, 11 *Abb. Pr.* 105; *Lowry v. Morrison*, 11 *Paige*, 327. In California, if the fact appears on the record, that after the institution of the suit the plaintiff conveyed a portion of the land in controversy to other persons, it would be no ground for reversing the judgment: *Barstow v. Newman*, 34 *Cal.* 90; *Moss v. Shear*, 30 *Id.* 468. The conveyance of the entire interest in the land by the plaintiff will necessarily defeat the action: *Barstow v. Newman*, 34 *Cal.* 90. The court may in ejectment, by consent of both plaintiff and vendee, make an order continuing in the name of the original plaintiff: *Moss v. Shear*, 30 *Cal.* 468. Such a sale is a transfer of the cause of action: *Id.* Or such purchaser may intervene: *Brooks v. Hager*, 5 *Cal.* 281.

21. Mexican Grant.—If the plaintiff relies on a title derived from the Mexican government and confirmed by the United States, without stating the time of confirmation, an answer which sets up as a defense the statute of limitations is good, without stating that the Mexican grant was finally confirmed more than five years next before the commencement of the action: *Anderson v. Fisk*, 36 *Cal.* 632.

22. Mexican Grant—Probate Sale.—If a Mexican grantee dies, and his heirs petition for and obtain to themselves a confirmation of the grant, and the patent issues to them, the legal title vests in the heirs and their grantees, and does not inure to the benefit of one who purchases at a probate sale made by the administrator of the grantee, so as to vest in him the legal title, and the patentees will prevail in ejectment against the purchaser at such sale if the defendant does not set up a valid equitable defense: *Hartley v. Brown*, 51 *Cal.* 467. If it be conceded that the administrator's deed was valid and sufficient to convey the interest which the deceased had in the land, such deed will not entitle them at law to the benefits of the confirmation and patent: *Id.*

23. Mexican Grant, Limitation.—The statute of limitations of 1850, as to real actions, was general, and no exceptions were made in favor of Mexican grants: Statutes of 1850, p. 344, sec. 6. In 1855 this section was amended by adding the following proviso: "Provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States or its legally constituted authorities:" Stat. 1855, p. 109, sec. 1. By the amendment of 1863 this proviso was stricken out, and in section 6 of the amendatory act, stat. 1863, p. 327, another proviso was adopted, giving to Spanish or Mexican claimants, or those claiming under them, whose claims had not

been finally confirmed more than five years before the passage of the act, five years after its passage to commence actions or make defenses, etc. A second proviso in the same section declared that "Nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate or the possession thereof, under title derived from Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory:" *Id.* The title declares this act to be amendatory of the act of 1850. "Final confirmation" was declared to be the issuance of the patent, or the final determination of the official survey, under the provisions of the act of congress of June 14, 1860 (12 U. S. Stat. at Large, pp. 33, 34) regulating the jurisdiction of the district courts of the United States in regard to the survey and location of confirmed private land claims: *Id.* sec. 7. Under this act Mexican grantees whose grants were finally confirmed, within the meaning of the act, prior to April 18, 1858, were barred under the act of 1855; and grants thus confirmed between April 18, 1858, and April 18, 1863, were not barred until April 18, 1868: *Morris v. DeCelis*, 51 Cal. 60. The provisos in the act of 1863 constitute exceptions to the otherwise general provisions of the act, and it has been uniformly held that a party claiming to be within the benefit of the exceptions must affirmatively establish his case in that respect, and this must be considered no longer an open question in this court: *Id.* p. 61. The party claiming title under a Mexican grant, if the other relies on five years' adverse possession, must show that the patent has not issued for the same, or that the official survey has not been approved by the district court, under the act of congress of June 14, 1860: *Id.* If the grantee of a Mexican grant conveys an undivided interest in the same, and, after the conveyance is made, holds possession of the whole of the grant adversely to all the world, for the period required by the statute of limitations, the title which he has conveyed is extinguished: *Hartman v. Reed*, 50 Cal. 485. The court in this case adds: "We are not to be understood, however, as holding that such adverse possession would have any effect as against a patent to the rancho subsequently issued, if Crosby and his grantees are entitled to the benefits of the patent." This, however, is *obiter*. That question did not arise in the case. Besides, it is difficult to understand why a right to the benefits of a patent may not be barred by an adverse holding, prior to its issue, as well as a title based upon the patent after its issue. Where the holding is adverse to the Mexican title, which is secured, or to be secured, through a patent issued by the United States, there can be no question but that the act of 1855 operated to protect the title against such adverse holding; but in the case of *Hartman v. Reed*, *supra*, Crosby's only claim was derived by conveyance from the Mexican grantee; his title depended upon the validity of the Mexican title, and was in no sense hostile or adverse to it, and if he permitted his grantor to hold adversely to him for the statutory period, the issuance or non-issuance of the patent could not affect the bar. The case was, therefore, rightly decided, and the paragraph above quoted we regard as inconsistent with the decision: see note 12, *ante*.

24. Insufficient Plea.—Defendant set up as a defense "that the title of the said plaintiff, if any he has to said premises, did not accrue within five years prior to the commencement of this suit, and that he has not been in possession thereof within five years prior to this suit:" *Held*, not to be a plea

of the statute of limitations: *McKay v. Petaluma Lodge, Reyburn et al.*, Cal. Sup. Ct., April Term, 1866. An answer which avers that "if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the statute of limitations, as they, the defendants, have been in quiet and peaceable possession of the same, adversely to these plaintiffs, for a period over five years," is not a good plea of the statute of limitations: *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387; see, also, *Boyd v. Blankman*, 29 Id. 20.

25. Must be Specially Plead.—The defense of five years' adverse enjoyment of an easement must be pleaded in order that it may be available: *American Co. v. Bradford*, 27 Cal. 360.

26. Conjunctive Denial.—An averment in a complaint that the defendant, since November, 1858, "has continued to possess and occupy said land and premises, and use the same in her said sole trader business," is not denied by a denial in the answer that defendant has continued since the ninth day of November, 1858, to occupy or use the said premises in her business as such sole trader: *Camden v. Mullen*, 29 Cal. 564.

27. Counter Averments.—If the complaint contains averments of the facts constituting a deraignment of title in a certain manner, and the answer contains a counter averment that the title was derived in a different manner, this counter averment is a denial, if it is alleged that the facts are not otherwise than averred in the counter statement: *Siter v. Jewett*, 33 Cal. 92.

28. Disclaimers.—An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, is not a disclaimer: *De Uprey v. De Uprey*, 27 Cal. 331; 14 Id. 576. Where defendants disclaim as to a part of the premises, and as to another part pleaded that plaintiff was not in possession at the time of the commencement of the action, it is not error to render judgment against them for costs: *Brooks v. Calderwood*, 34 Cal. 563. Where the plaintiff succeeds in part, and fails in part, costs may be awarded, at least upon the part on which he succeeded: Id. And defendants cannot take advantage of the statutory provision relating to disclaimers to save themselves from costs where they have raised the issue on plaintiff's possession: Id. One who held possession in subordination to and in privity with the title of the rightful owner, is not precluded from imparting by his own acts an adverse character to his possession. Nor is it necessary to first surrender the premises. The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after expiration of lease, or even before, by forfeiture of lease disclaiming the tenure, and attorning to another: 7 Wheat. 535; *Williston v. Watkins*, 3 Pet. 47; *Walden v. Bodley*, 14 Id. 156; *Reed v. Proprietor of Locks and Canals*, 8 How. U. S. 274. So, the vendee, the title of his vendor after breach of his contract, and the statute will commence to run at the time of such disclaimer: 2 Bos. & P. 542; 5 Barn. & Ald. 232; Cowp. 217; 2 Stark. Ev. 887; 7 Johns. Ch. 90; 20 Johns. 565; 4 Serg. & R. 310; Id. 570; 2 Sch. & Lefr. 633. But a clear, positive, and continued disclaimer is necessary: *Zeller v. Eckert*, 4 How. U. S. 289.

29. Forfeiture, Plea of.—In an action of ejectment to recover mining claims, an answer to the complaint which avers that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs, and regulations of the miners of the diggings, em-

bracing the claims in dispute, prior to the defendant's entry, is insufficient, in not setting forth the rules, customs, etc.: *Dutch Flat Co. v. Mooney*, 12 Cal. 534. The facts should be stated so as to enable the court to determine whether the forfeiture did accrue. The averment of forfeiture is a legal conclusion upon which no issue can be taken: *Id.*

30. Former Recovery.—A plea of former recovery in ejectment, as to a part of the demanded premises, should describe the land which was in contest in the former action, and such plea is bad, if it is pleaded as a general defense to the whole action, and there are several plaintiffs, and the former recovery was against one only of the several: *Anderson v. Fisk*, 36 Cal. 625. In an action of ejectment to recover the possession of land, where the defendant simply denied the allegation of the complaint: *Held*, that he could not introduce in evidence a copy of the record of a former recovery: *Piercy v. Sabin*, 10 Cal. 22.

31. Fact of Possession.—Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact not in issue by the pleadings, but affecting the whole case: *Powell v. Oullahan*, 14 Cal. 114.

32. General Issue.—If the defendant in ejectment pleads the general issue only, the plaintiff is entitled to recover, in case the defendant is found in possession of any part of the demanded premises: *Greer v. Mezes*, 24 How. U. S. 268. The general issue plea is not guilty, and under it, coverture, or any other available defense may be taken: *Black v. Tricker*, 52 Penn. 436. In an action of ejectment, under the general issue, the question at issue is not whether the ancestor once had title, and the right of possession, but whether the plaintiffs, at the commencement of the action, had such title and right. Under the general issue, or a general denial of all the allegations of the complaint, the defendant may controvert by evidence any and every fact which the plaintiff is bound to establish to make out his cause of action: 16 Barb. 633. He cannot, under such an answer, prove a discharge of a cause of action once existing in the plaintiff against him, because that is an affirmative defense, or new matter, which must be pleaded. But he may show that the plaintiff never had any such cause of action against him as is alleged in the complaint: *Raynor v. Timerson*, 46 Barb. 518. Matter that goes to affect the title may be proved under the general denial: *McCormic v. Leggett*, 8 Jones L. (N. C.) 425; *Moore v. Tice*, 22 Cal. 516. So, abandonment of land may be proved: *Wilson v. Cleveland*, 30 Cal. 192; *Bell v. Brown*, 22 Id. 671; see note 16, *ante*. A general denial, in an action of ejectment, brings in issue the respective titles of plaintiff and defendant: *Marshall v. Shafter*, 32 Cal. 176.

33. Grant of Easement.—Grant of easement or servitude must be specially pleaded: *American Co. v. Bradford*, 27 Cal. 368. The lessee of an inner close has, by necessity, a right of way over an outer close which belongs to his lessor, but he cannot by user acquire an easement to deposit packages on a close which belongs to his lessor: *Gayford v. Moffatt*, Law Rep. 4 Ch. 133.

34. Homestead.—The husband or the wife may set up the facts of homestead, as a defense to ejectment, based upon a sheriff's deed of the premises, made in pursuance of an execution sale on a judgment at law against the husband, there having been no abandonment of the homestead: *Williams v. Young*, 17 Cal. 403. A defendant in possession may show that he has entered the land under the homestead law of the United States, and is not estopped, by a sale and delivery of possession to him by the plaintiff, from showing that he now holds them under said laws: *Holden v. Andrews*, 38 Cal. 119. He does not thereby deny the title of the vendor, but he confesses and avoids it. He may show that the vendor's title has expired, for by the estoppel he is precluded from denying only what he has previously admitted, and by executing the contract, and entering under it, he admitted the existence, but not the continuance of title in the vendor: *Jackson v. Rowland*, 6 Wend. 670; *Dispard v. Wallbridge*, 15 N. Y. 374; *Holden v. Andrews*, 38 Cal. 119. And, as the right to possession depends upon title, when the vendor's title expires, his right to possession expires.

35. Misjoinder.—Where two are joined as plaintiffs in an action for the recovery of possession of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs: *Gillam v. Sigman*, 29 Cal. 637.

36. New Matter.—Subsequently acquired title in defendant must be specially set up: *Moss v. Shear*, 30 Cal. 468. Title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*: *Moss v. Shear*, 30 Cal. 468; *Hardy v. Johnson*, 1 Wall. U. S. 371. So, also, a transfer of title by plaintiff must be by supplemental answer, or it cannot be given in evidence: *Moss v. Shear*, 30 Cal. 468. The interest of a mortgagor in possession was sold on execution, and ejectment was brought against him by the purchaser: *Held*, that the mortgagor could defend his possession by taking a lease from the mortgagees, and setting it up by a plea *puis darrein continuance*: *Simmons v. Brown*, 7 Rhode Island, 427.

37. Non-tenure.—In most actions non-tenure is, in Massachusetts, a good plea either in bar or abatement, though in some states and in England it is good only in abatement: *Fiedler v. Carpenter*, 2 Woodb. & M. 211. A mortgagor in possession cannot, in a suit against him by his mortgagee, to recover possession of the mortgaged premises, plead special non-tenure: *Marsh v. Smith*, 18 N. H. 366.

38. Several Defenses.—In an action to recover a mining claim, the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the court ordered defendants to elect on which of the above defenses they would rely, and defendants having, after excepting to the order, elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture: *Held*, that the action of the court was error; that defendants had the right to set up both defenses in their answer, and support both by proof: *Bell v. Brown*, 22 Cal. 671. The defendant may deny the title of the plaintiff, and also plead the statute of limitations: *Wilson v. Cleaveland*, 30 Cal. 192. If in ejectment there are

several defenses set up in the answer, some of which are insufficiently pleaded, and the defendants have a general verdict, and the record does not disclose on which one of the defenses the verdict was rendered, the judgment will be reversed: *Anderson v. Fisk*, 36 Cal. 625.

No. 764.

iv. *By one of Several Tenants Charged as Joint Tenants.*

[TITLE.]

The defendant answers to the complaint:

That the defendants, A. B. and C. D., at the times mentioned in the complaint, and ever since, have held and occupied segregated portions of the premises separately, and not jointly, to wit: The defendant, A. B., the part (stating what), and the defendant, C. D., the part (stating what).

39. Form.—For a form of defense, see *Fosgate v. Herkimer Manufacturing and Hydraulic Co.*, 12 N. Y. 580; 12 Barb. 352.

40. Improvements—Set-off.—Where damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, the value of such improvements may be pleaded as a set-off to the damages for withholding the property: Cal. Code C. P. sec. 741; *Yount v. Howell*, 14 Cal. 465; *Ford v. Holton*, 5 Id. 319; *Welch v. Sullivan*, 8 Id. 165. But where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property: *Ford v. Holton*, 5 Cal. 319. A defendant in ejectment, who has made permanent improvements on the land in controversy, is not entitled to set off the value of those improvements against the damages claimed by the plaintiff, unless the improvements have been made by him, or those under whom he claims, while holding possession under color of title, adversely to the claims of plaintiff, and in good faith: *Love v. Shartzer*, 31 Cal. 488; *Carpentier v. Small*, 35 Cal. 346; see *Bay v. Pope*, 18 Cal. 694. Where one who entered as a naked trespasser, places improvements on the land, and afterwards buys an undivided interest, in an action against him to recover possession of the land, by a tenant in common, who owned prior to the wrongful entry, the defendant cannot set off the value of his improvements against the damages: *Carpentier v. Mitchell*, 29 Cal. 330. But not where improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse within that section: *Bay v. Pope*, 18 Cal. 694; *Love v. Shartzer*, 31 Cal. 487. Nor where defendant entered under a bond for a deed from the plaintiff: *Kilburn v. Ritchie*, 2 Cal. 145. Value of improvements must be specially claimed by defendant: *Carpentier v. Gardner*, 29 Cal. 160; *Moss v. Shear*, 25 Cal. 38.

41. Improvements—Landlord and Tenant.—In Missouri, a tenant who disclaims the title of his landlord cannot, if defeated, have improvements: *McQueen v. Chouteau*, 20 Mo. 222. The fact that the defendant has made permanent and valuable improvements, in good faith and under color of title, is no defense to the action; but if such fact is set up in the answer,

in such language as to contain the essential facts to justify a set-off of the value of improvements against rents, it will be treated as a good answer for that purpose, although no offer is made of such set-off: *Anderson v. Fiat*, 36 Cal. 625. An agreement to pay for the improvements, if made, is no defense in ejectment: *Norris v. Hoyt*, 18 Id. 219. See, as to improvements under a lease, *Gett v. McManus*, 47 Id. 56.

42. Joint and Several Tenancy.—In a writ of right, brought under the statute of Kentucky, where the demandant describes the lands by metes and bounds, and counts against the tenants jointly, the tenants, by pleading in bar, admit their joint seisin, and lose the opportunity of pleading a several tenancy: *Liter v. Green*, 2 Wheat. 306.

43. Oregon Rule.—By the civil practice act of the state of Oregon, section 316, the defendant is prohibited from giving in evidence “any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer.” By section 314, a defendant in actual possession may, for answer, plead that he is in possession only as tenant of another, and thereupon the landlord, if he apply, may defend.

44. Separate Answer.—Defendants may answer separately, or demand separate verdicts: *Winans v. Christy*, 4 Cal. 70. Where there are several defendants, to entitle them to separate verdicts, they should set forth, with specific description, the parcels which they severally occupy or claim: *Patterson v. Ely*, 19 Cal. 28; *McGarvey v. Little*, 15 Id. 31. If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for *mesne* profits in a corresponding proportion; he must frame his answer accordingly, and specify the portion of the premises for which it is intended to defend, and disclaim as to the balance: *Guy v. Hanly*, 21 Cal. 397.

45. Several Answer.—In an action to recover the possession of lands from several defendants, a defendant who does not set up in his answer that his occupation and possession were exclusive and in severalty, and that the other defendant was in the exclusive occupation and possession of the remaining portion, thereby waives the objection that the plaintiff could not maintain the action against him and the other defendant jointly; and the plaintiff is not bound to elect at the trial against which of the defendants he will proceed: 2 Kern. 580; *Dillaye v. Wilson*, 43 Barb. 261.

No. 765.

v. Estoppel.

[TITLE.]

The defendant answers to the complaint:

That plaintiff ought not to be admitted to allege [here state the matter to which the estoppel is interposed—*e. g.*] that the said premises belonged to C. D., because he alleges [here state the subject-matter of the estoppel—*e. g.*], that the plaintiff, on or about the day of, 187., conveyed said premises to the defendant by deed, containing a full covenant of warranty. [State facts as they exist.]

46. Doctrine of Estoppel. — The doctrine of estoppel, which may be said to be founded upon the adage that "the truth is not to be spoken at all times," is a harsh one, and is never to be applied except where to allow the truth to be told would consummate a wrong to the one party, or enable the other to secure an unfair advantage: *Franklin v. Merida*, 35 Cal. 558. A person who has acquired the possession of lands under a contract of purchase, is precluded while he continues in possession from disputing the title of his vendor; but he is not estopped from showing that his vendor's title has expired: *Holden v. Andrews* 38 Cal. 119. And if, instead of a third person, the defendant has acquired the plaintiff's title, he is entitled to occupy the position that would have been held by the third person had the title vested in him: *Id.*

47. Estoppels in Pais.—It was the old rule that only specialty or record could be pleaded by way of estoppel: *Davis v. Tyler*, 18 Johns. 490; *Welland Canal Co. v. Hathaway*, 8 Wend. 480. But later cases sanction the idea that estoppels in pais may also be thus pleaded: *Gaylord v. Van Loan*, 15 Wend. 308; *People v. Bristol and Rensselaerville Turnpike Co.*, 23 Id. 222. Where an equitable estoppel in pais is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence, without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded: *Davis v. Davis*, 26 Cal. 38.

48. Estoppel. — An estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Where no opportunity to plead it occurs, it is conclusive as evidence: *Flandreau v. Downey*, 23 Cal. 354; *Corkhill v. Landers*, 44 Barb. 218. So far as a deed is intended to pass or extinguish a right, it is the exclusive evidence of the contract, and the party is concluded by its terms; but the deed is not conclusive evidence of the existence of facts acknowledged in the instrument, such as its date, acknowledgment of payment, consideration, etc.: *Rhine v. Ellen*, 36 Cal. 362. Where plaintiff had possession under a deed duly recorded, and the defendant entered with notice of and in subordination to plaintiff's title, he cannot be permitted to deny it in an action of ejectment: *Stephens v. Mansfield*, 11 Cal. 363.

49. Former Judgment. — A judgment in an action of ejectment, in which the landlord of the defendant defends the action for and in the name of his tenant, and puts his own title in issue, is admissible in evidence by way of estoppel in an action of ejectment, brought by the same plaintiff against such landlord: *Russell v. Mallon*, 38 Cal. 259; *Valentine v. Mahoney*, 37 Id. 389.

50. Landlord and Tenant.—A tenant is estopped to deny that his landlord has a legal reversion, though it appear from the instrument of demise that the landlord has only an equity of redemption: *Morton v. Woods*, Law Rep. 3 Q. B. 658. As between landlord and tenant, the estoppel is designed as a shield for the protection of the former, but not as a sword for the destruction of the latter: *Franklin v. Merida*, 35 Cal. 558. The bare possession by the tenant of the demised land at the time the lease is given, is sufficient to take the case out of the operation of the general rule, and the tenant cannot before surrendering possession, dispute the landlord's title: *Tewksbury v. Magrath*, 33 Cal. 237; affirmed, *Franklin v. Merida*, 35 Id. 558. If A. being in pos-

session of land, deliver the possession to B. upon his request and upon his promise to return it, with or without rent, at a specified time, or at the will of A., B. cannot be allowed, while still retaining the possession, to dispute A.'s title; but it is otherwise if B. is in possession and takes a lease from A., since the latter parts with nothing, and the former has obtained nothing, by the transaction: *Franklin v. Merida*, 35 Cal. 558. A tenant of the defendant in ejectment, who acquired his lease before the commencement of the suit, is not estopped as to his term by the judgment in an action obtained against his lessor: *Satterlee v. Bliss*, 36 Cal. 489; as the estoppel of a party with respect to the assertion of one title may not avail to prevent him from setting up another, differently derived: *Wheeler v. Ruckman*, 2 Abb. Pr. (N. S.) 186.

51. May be Pled.—Equitable estoppels and defenses can be entertained in actions at law, but they must be specially stated in the answer: *Clark v. Huber*, 25 Cal. 593; *Davis v. Davis*, 26 Id. 39. If defendant has no opportunity to plead estoppel, he may exhibit the matter thereof in evidence: *Philadelphia R. R. Co. v. Howard*, 13 How. U. S. 308.

52. Must be Sufficiently Pled.—The court, and not the jury, must pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to warrant the court in granting a decree which will estop the further prosecution of the action: *Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Cal. 660; *Estrade v. Murphy*, Id. 248; *Meador v. Parsons*, Id. 294; *Carpentier v. City of Oakland*, 30 Id. 439; *Blum v. Robertson*, 24 Id. 146; *Downer v. Smith*, 24 Id. 124.

53. Purchase of Adverse Claim.—One who is in possession of and claiming to own land, does not admit title in another because he buys the other's claim of title, solely to quiet his own title and avoid litigation. Such purchaser is not estopped by such purchase from denying the validity of the claim thus purchased: *Cannon v. Stockmon*, 36 Cal. 535.

No. 766.

vi. *Equitable Estate in Defendant.*

[TITLE.]

The defendant answers to the complaint:

First. For a first defense:

I. [Deny title in plaintiff.]

Second. And as an equitable defense to said action, and as a cross-complaint therein, the defendant alleges:

I. That on the day of, 187..., the plaintiff executed and delivered to the defendant his agreement in writing, for the sale and conveyance to the defendant of the premises described in the complaint, a copy of which agreement is as follows: [Copy the agreement.]

II. That the defendant fully performed all the conditions of said agreement on his part, yet the said plaintiff has not conveyed the said premises to the defendant, but to do so

hath hitherto, and still does, neglect and refuse, though often requested thereto.

Wherefore the defendant demands that the plaintiff be adjudged to convey said premises to the defendant, in fee, by deed, with covenants, in pursuance of said agreement, and be enjoined from the further prosecution of this action.

54. Character of Defense.—When an equitable answer is interposed to an action of ejectment, said answer, being a bill in equity, can only be interposed where the parties to the action are such as would be required to a bill in equity seeking the same relief: *Lestrade v. Barth*, 19 Cal. 660.

55. Defense may be Interposed.—Under our system of practice, equitable defenses may be interposed to the action of ejectment, but the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal right to the premises, or such as will stop the plaintiff in the prosecution of the action: *Estrada v. Murphy*, 19 Cal. 248; *Weber v. Marshall*, Id. 447; *Downer v. Smith*, 24 Id. 124; *Blum v. Robertson*, Id. 146. And he must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity: *Davis v. Davis*, 26 Cal. 38.

56. Election of Remedy.—Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief: *Lorraine v. Long*, 6 Cal. 452.

57. Equitable Title.—An equitable title arising out of a contract for a sale of land, is a defense to an action instituted to recover possession of the land, the subject of the contract: *Tibeau v. Tibeau*, 19 Mo. 78.

58. Injunction.—The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial: *Arguello v. Edinger*, 10 Cal. 150.

59. Must be Specially Plead.—Equitable defense is fully available under the code in this form of action: *Murray v. Walker*, 31 N. Y. 399; *Safford v. Hynds*, 39 Barb. 625; *Lee v. Parker*, 43 Id. 611; *Corkhill v. Landers*, 44 Id. 218. The equitable defense is first to be passed upon by the court; and until it is disposed of the assertion of the legal remedy is in effect stayed. Upon the determination of the court upon the relief prayed by the answer, the necessity of proceeding with the action at law will de-

pend. When it does proceed, the legal title will control its result: *Estrada v. Murphy*, 19 Cal. 248; *Martin v. Zellerbach*, 38 Cal. 300. And it is irregular to submit to the jury all the legal and equitable defenses together: *Lestrade v. Barth*, 19 Cal. 660; see also notes 51 and 52, *ante*.

No. 767.

vii. *Adverse Possession.*

[TITLE.]

The defendant answers to the complaint:

That at the time of the delivery of the deed alleged in the complaint, the lands therein described were in the actual possession of one A. B., who then and ever since claimed to be the owner thereof, and now claims adversely to the said grantor.

60. Adverse Possession.—Adverse possession is of two kinds: First, where possession is taken without color of title, but with intent to claim the fee against all comers: Cal. Code C. P., sec. 321. Second, where possession is taken under a claim of title founded on a written instrument or a judgment of a court of competent jurisdiction: *Kimball v. Lohmas*, 31 Cal. 154. It may be acquired to part of a tract, while the owner of the title is in possession of the other part of the same tract: *Davis v. Perley*, 30 Cal. 630.

61. Adverse Possession of Water.—The right to the use of a water-course on the public lands may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists. And on adverse possession, for the time provided by statute of limitations, the law will presume a grant of the right to its use: *Union Water Co. v. Crary*, 25 Cal. 504; see *Humphreys v. McCall*, 9 Cal. 59.

62. Consecutive Possession.—The possession of several persons in succession, claiming under the same title, is the same possession: *Lea v. Polk Co. Copper Co.*, 21 How. U. S. 493. So, a vendee's possession may be joined with that of his vendor: *Alexander v. Pendleton*, 8 Cranch, 462. But the possession of different intruders in succession cannot be added together to create a title in the last intruder, especially where there is no privity between them: *Potts v. Gilbert*, 3 Wash. C. Ct. 475; overruled in part, see *Overfield v. Christie*, 7 Serg. & R. 173; *Sheetz v. Fitzwater*, 5 Penn. 126; see *S. F. v. Fulde*, 37 Cal. 353; *San Jose v. Trimble*, 41 Cal. 541, 543. The decision that adverse possession is not transferable was never acknowledged as sound by any land lawyer or judge of Pennsylvania: *Moore v. Small*, 9 Penn. 194. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants plead possession in themselves, and the parties through whom they claim, for five years before the commencement of the action, in accordance with mining customs on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1856; *Held*, that the plea is of no avail, because the admission shows plaintiffs were seised of the premises within the five years: *Fremont v. Seale*, 18 Cal. 433. If the possession of two or more persons in succession, holding in privity with each other, under title or color of title, makes out the prescribed time, the bar is complete: 10 Tex. 382; *Christy v. Alford*, 17 How. U. S. 601. But where the grantee's

deed either called for land different from that sued for, or was void for uncertainty of description, it was held he did not connect himself, by means of such deed, with the possession of his grantor: *People v. Klumpke*, 41 Cal. 264.

63. Equitable Title.—The purchaser of an equitable title by bond or contract, may, equally with the purchaser of the legal title by deed, set up his possession as adverse to the vendor, as the vendor without a deed is the trustee of the vendee for the conveyance of the title: *Boone v. Chiles*, 10 Pet. 177. But a possession under a purchase, without deed or payment of purchase-money, cannot by lapse of time ripen into a title. Possession is in such case possession of the vendor, and the same as landlord and tenant: *Stansbury v. Taggart*, 3 McLean, 457.

64. Essential Allegations.—It was held in *Clarke v. Hughes*, 13 Barb. 147, that an answer of adverse possession must give the name of the possessor, and allege that he had title, and state the facts which are necessary to show the possession adverse. This case must be regarded as overruled, so far as it relates to the exclusion of evidence at the trial where there is no such averment, in the case of the adverse enjoyment of an easement, in *White v. Spencer*, 14 N. Y. 247.

65. Five Years' Possession Construed.—A defendant in ejectment, who relies on the statute of limitations, need not prove adverse possession for the five years *next preceding* the commencement of the action. His defense is complete if he shows a five years' continued adverse possession, although not the five years *next preceding* the commencement of the suit: *Moon v. Rollins*, 36 Cal. 333; *Cannon v. Stockmon*, 36 Cal. 538. The fee acquired by a five years' possession continues till conveyed by the possessor, or till lost by another adverse possession of five years: *Cannon v. Stockmon*, 36 Cal. 538.

66. Must be Specially Plead.—Adverse possession, if set up as a defense, must be specially pleaded. But title out of the plaintiff may be shown under a general denial: *Raynor v. Timerson*, 46 Barb. 518; *Page v. Fowler*, 28 Cal. 611; *McManus v. O'Sullivan*, 48 Id. 15. An answer denying that defendant is in possession, or that he unlawfully withholds possession, does not raise the question of adverse possession, or authorize a recovery for defendant on that ground. If he seeks to prevail upon an adverse possession, or on the ground that the conveyance under which plaintiff claims was made pending an adverse possession, he should in his answer set up title in himself or out of the plaintiff: *Ford v. Sampson*, 8 Abb. Pr. 332; S. C., 30 Barb. 183.

67. Possession as Tenants in Common.—A party relying upon an adverse possession for five years, of land owned by himself and the adverse party as tenants in common, must allege, by pleading facts from which it will affirmatively appear, that his possession was of an adverse and positive character; otherwise his possession of the land, though exclusive, will be deemed to be according to his right, and in support of the title in common: *Lick v. Diaz*, 30 Cal. 65.

68. Prescription.—To constitute a foundation for adverse possession at the common law, the instrument under which the occupant entered must purport in its terms to transfer the title, and the occupant must have entered under it in good faith, and with intention to hold against all the world: *Nieto*

v. *Carpenter*, 21 Cal. 455. No title to public lands, mineral or otherwise, will accrue to any person against the general government, by prescription, adverse possession, or estoppel *in pais*: *Doran v. C. P. R. R. Co.*, 24 Cal. 245; *Jackson v. Porter*, 1 Paine, 457. At common law, an adverse possession of fifty years, though with knowledge of a better title, constitutes a good defense against that title: *Alexander v. Pendleton*, 8 Cranch, 462; *Ewing v. Burnett*, 11 Pet. 41; affirming 1 McLean, 266.

69. Statute, how Construed.—It is a universally accepted rule, that statutes of limitations are to be strictly construed. General words in the statute must receive a general construction, and, if there be no express exception, the courts can make none: *Tynan v. Walker*, 35 Cal. 634. The clause in the statute of limitations which provides that civil actions shall be commenced within certain periods therein prescribed "after the cause of action shall have accrued," does not imply, in addition, the existence of a person legally competent to enforce it by suit. The statute must run in all cases not therein expressly excepted from its operation: *Tynan v. Walker*, 35 Cal. 634. An equitable action, to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions: *City of Oakland v. Carpentier*, 13 Cal. 540.

70. Statute, how Pledged.—There is no technical rule observed by the court of chancery as to the form of a plea of the statute of limitations. A plea which sets up an adverse possession of forty years, while the period required by the statute of the state to bar a recovery is twenty years, is good; nor is it necessary to make any express reference to the statute of the state: *Harpending v. Reform. Dutch Church*, 16 Pet. 455. It must be pleaded at the proper time, with no day of grace thereafter: *Cook v. Spears*, 2 Cal. 409; to the same effect: *Meeks v. Hahn*, 20 Cal. 620; and *American Co. v. Bradford*, 27 Cal. 360. If an action of ejectment is in the name of the plaintiff who has sold pending the action, the defendant cannot plead the statute of limitations as against the vendee of the plaintiff: *Moss v. Shear*, 30 Cal. 468. What such a plea should state in ejectment, see *Sharp v. Daugney*, 33 Cal. 505; *Vassault v. Seitz*, 31 Cal. 225.

71. Title by Adverse Possession.—A person in the adverse possession of land for five years, claiming to own the same exclusive of any other right, thereby acquires a fee-simple title to the same; and if he is then ousted, even by the party having the paper title, he can recover possession at any time before his right of action is barred by a five years' adverse possession: *Cannon v. Stockmon*, 36 Cal. 535. Evidence of acts and declarations of one in possession. The party claiming title by virtue of five years' adverse possession, may give in evidence his acts and declarations made or done at any time while in possession, for the purpose of showing the character in which he claimed: *Id.* Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property, confers a title thereto denominated a title by prescription, which is sufficient against all: Cal. Civ. Code, sec. 1007. The lapse of time limited by such statute not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder: *Leffingwell v. Warren*, 2 Black; (U. S.) 605; *Arrington v. Liscom*, 34 Cal. 381; *Grimm v. Curley*, 41 Id. 250.

FORMS OF ANSWERS—SUBDIVISION SIXTH.

In Actions Concerning Real Property.

CHAPTER I.

FORECLOSURE OF MORTGAGES AND LIENS.

No. 768.

i. Denial of Mortgage by Purchaser from Mortgagor.

[TITLE.]

The defendant [purchaser] answers to the complaint:

That he has no information or belief sufficient to enable him to answer the allegations in plaintiff's complaint as to whether the defendant [mortgagor] ever executed the bond and mortgage described in the complaint, or whether the defendant [mortgagee] ever assigned said supposed bond and mortgage to the plaintiff, or whether he is now the lawful owner or holder thereof; and therefore this defendant denies that said defendant [mortgagor] at any time executed said alleged bond or mortgage, and denies that said defendant [mortgagee] at any time assigned said alleged bond or mortgage to the plaintiff, and denies that plaintiff is now the owner or holder of said alleged bond or mortgage.

1. Conditional Deed.—Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant on the understanding that, if the money was repaid in six months, with interest, plaintiff was to re-convey, and does not specifically deny that the money was loaned: *Held*, that it virtually admitted the loan: *Lee v. Evans*, 8 Cal. 424. The allegation in the answer, that unless the money was returned, the property should remain in the plaintiff, does not change the nature of the contract: *Id.*

2. Condition against Public Policy.—A person who conveys land upon an unlawful condition subsequent, and then purchases it back, and executes a mortgage for the purchase-money, cannot resist the enforcement of the mortgage on the ground that the condition subsequent was against public policy, or that there was a want of consideration: *Patterson v. Donner*, 48 Cal. 369.

3. Denial of Condition.—In a foreclosure action, the complaint set forth the condition of the bond, and alleged that the mortgage was executed "with the same conditions as the bond." The answer denied that the mortgage

contained the condition, repeating it as stated in the complaint: *Held*, insufficient on demurrer. It was not a denial that the mortgage contained, by reference to the bond, or otherwise, substantially the same condition. To raise that issue, the defendant should have denied the deeds, or set forth the condition of the mortgage in *hæc verba*, that the court might see what it was: *Dimon v. Dunn*, 15 N. Y. 498.

4. Denial of Delivery.—Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery: *Blankman v. Vallejo*, 15 Cal. 638.

5. Disclaimer.—In a foreclosure action, a defendant who is not alleged to be personally liable, and who disclaims all interest in the mortgaged premises, cannot demand a judgment against the plaintiff, on a note, a bond, or a covenant: *National Fire Insurance Co. v. McKay*, 21 N. Y. 191; compare *Agate v. King*, 17 Abb. Pr. 159.

6. Duress of Wife.—The execution by the wife of a mortgage, under compulsion and undue influence of her husband, does not render the mortgage void, but only voidable; and if the mortgage is given to secure an antecedent debt, and the mortgagee has no notice of such compulsion and undue influence, the mortgage cannot be avoided on that ground: *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580.

7. Estoppel.—A mortgagor, who mortgages in fee, is estopped from denying that the estate mortgaged was other or less than an estate in fee-simple: *Vallejo Land Assn. v. Viera*, 48 Cal. 572.

8. Failure of Title.—An answer in a foreclosure suit which alleges that the mortgage was given to secure the purchase-money of said real estate, and that the property was conveyed by warranty deed, with covenants, etc., by the mortgagee to the mortgagor, and that the former had previously granted a right of way to a railroad over a part of the land, but not showing that the defendant had been evicted or suffered any damage or inconvenience on account of such right of way, is bad on demurrer: *Gilfillan v. Snow*, 51 Ind. 305.

9. Former Judgment.—A judgment that the mortgage is not paid off, is not conclusive in another suit as to amount remaining due: *Campbell v. Consalus*, 40 Barb. 509. Judgment of foreclosure, entered on stipulation, as without prejudice to claim of paramount adverse title on part of defendant, is no bar to his subsequent assertion of claim so reserved: *Lee v. Parker*, 43 Barb. 611. Omission to set up a prior judgment-lien, in defense to foreclosure of one incumbrance, is no bar to setting it up as a defense in suit to foreclose another on the same property: *Frost v. Koon*, 30 N. Y. 428.

10. Fraudulent Mortgage.—A mortgage fraudulently given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor: *Tully v. Harlo*, 35 Cal. 302. E. made a usurious mortgage to V., who foreclosed and sold to an innocent third party under a power of sale: *Held*, that E. could not set up the usury against the purchaser: *Elliott v. Wood*, 53 Barb. 285. Where the defendant pleaded *non est factum* and usury, it was held no defense in foreclosure by *scire facias*: *Camp v. Small*, 44 Ill. 37.

11. Homestead.—If husband and wife own a tract of land, part of which is claimed as a homestead, and both execute a mortgage on the whole tract

to secure a debt, and the husband afterwards executes a mortgage upon the part not covered by the homestead to secure his debt, and the first mortgagee forecloses, making the other mortgagee a party; the second mortgagee cannot insist that the homestead be sold, but the decree should direct the part not covered by the homestead to be first sold, and if the proceeds satisfy the first mortgage, that the homestead be reserved from sale. The second mortgagee must rely on the surplus, if any, arising from the part not covered by the homestead: *McLaughlin v. Hart*, 46 Cal. 638; see also *Barber v. Babel*, 36 Cal. 11, as to effect of renewal by husband, on statute of limitations.

12. Husband and Wife.—In a foreclosure suit on a note and mortgage of the homestead executed by husband and wife, the wife alone answered, but did not verify her answer. On suit brought to vacate the decree rendered in the foreclosure suit, the wife, having been served with process, cannot complain that her answer was not verified. And her failure, by excusable negligence, to make defense to the foreclosure, is no ground to vacate the decree, if it be shown that in fact she had no defense: *Pfeiffer v. Richn*, 13 Cal. 643.

13. Insolvency.—A mortgagee may enforce his mortgage as against the land, notwithstanding the personal liability of the mortgagor for the debt may be barred by a discharge in insolvency: *Christy v. Dana*, 42 Cal. 174.

14. Literal and Conjunctive Denials.—Where the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure this bond, the denials in the answer being literal and conjunctive, the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond: *Blankman v. Vallejo*, 15 Cal. 638.

15. Mechanics' Liens.—A formal objection to a mechanic's claim, should be raised by demurrer, or by motion to strike it off: *Lybrandt v. Eberly*, 36 Penn. 347. The formal validity of a mechanic's lien is not put in issue by a plea of payment; and hence, under such plea, the claim may be read to the jury as an admitted cause of action, and may be sent out with them: *Id.* On February 6, 1867, a lien law was approved and went into effect: *Held*, that no lien could attach for work done before February 7: *Hunter v. The Savage Consol. Silv. Min. Co.*, 4 Nev. 153.

16. Pre-emption Claim.—If a person residing on public land subject to pre-emption, execute a mortgage thereon, and then sells the land to another, who takes possession and afterwards pre-emptes the land and obtains title from the United States, the mortgage can not be enforced against the title thus acquired from the United States, because the person holding such title did not acquire it through the mortgagor: *Bull v. Shaw*, 48 Cal. 455. But the case is otherwise with a title subsequently acquired by the mortgagor, even though he may have conveyed it to a third person. *Christy v. Dana*, 42 Cal. 174.

17. Remedy at Law.—To a bill for foreclosure, averring that no proceedings at law have been had, a plea that the complainant, before bill filed, had recovered a judgment for the debt, is good. It is not necessary to add that the complainant had not exhausted his remedy at law: *North River Bank v. Rogers*, 8 Paige, 648.

18. Sale of Part.—If a mortgage is given on two pieces of land and the

mortgagee enforces it against, and sells only one piece, he thereby waives the mortgage-lien on the other piece; and if the land sold fails to bring the amount due and costs, and a judgment is docketed for the deficiency, the mortgagor cannot complain: *Mascarel v. Raffour*, 51 Cal. 242.

19. Signature of Guardian.—In proceedings to foreclose a mortgage against a minor's real estate, the fact that the note and mortgage are not executed by signing the name of the minor thereto, but by signing the name of the guardian as such, is no defense: *Trutch v. Bunnell*, 5 Oreg. 504.

20. Statute of Limitations.—The statute of limitations requires an action to foreclose a mortgage to be commenced within four years from the time when the cause of action accrued, and the statute commences to run from the time the note is due: *Belloc v. Davis*, 38 Cal. 242. Of the method of pleading the statute of limitations, in an action brought to obtain redemption of mortgaged premises, see *Fogal v. Pirro*, 10 Bosw. 100; S. C., 17 Abb. Pr. 113. Where money is loaned without note or writing, and a mortgage given to secure its repayment, though the statute of limitations may run against the debt in two years, it does not bar an action to foreclose the mortgage in less than four years: *Cookes v. Culbertson*, 9 Nev. 199.

21. Statute, who may Plead.—In an action to recover judgment for the amount of the debt secured by mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgagor, purchasers subsequent to the execution of the mortgage, have a right to plead the statute of limitations as to that part of the claim of plaintiff which asks for a decree foreclosing the mortgage, and a sale of the mortgaged premises: *Grattan v. Wiggins*, 23 Cal. 16. A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the statute of limitations as a defense to an action for the foreclosure of the mortgage, commenced after the statute has run against the debt secured: *McCarthy v. White*, 21 Cal. 495; see *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, Id. 361.

22. Tax Title.—Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title; he cannot object afterward that equity has no jurisdiction over tax titles: *Kelsey v. Abbott*, 13 Cal. 609.

23. Tender.—A tender of the amount due on a debt secured by mortgage, made after the debt falls due, does not release the lien of the mortgage: *Himmelmänn v. Fitzpatrick*, 50 Cal. 650.

24. Title Acquired after Mortgage.—If a person mortgages public land upon which he is residing, and afterwards obtains a patent to the same from the United States and then sells, the title acquired by the patent inures to the benefit of the mortgagee, and the mortgage may be enforced against the subsequent purchaser: *Christy v. Daney*, 42 Cal. 174. But see *Bull v. Shaw*, 48 Id. 455.

25. Vendor's Lien.—An answer in an action to enforce a vendor's lien, which set up a homestead exemption, is demurrable when it does not contain such a statement of facts that the court can determine whether the homestead right existed or not: *Pratt v. Delleven*, 17 Iowa, 307.

*No. 769.*ii. *Denial of Notice.*

[TITLE.]

The defendant answers the complaint, and alleges:

That plaintiff did not cause his said mortgage to be recorded as alleged, or at all, and that this defendant had no notice, actual or constructive, of the existence of plaintiff's said mortgage, at or before the time this defendant took his said [conveyance or incumbrance].

*No. 770.*iii. *Mortgage not Assigned.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said did not, by deed duly executed, convey all his right or title, as such mortgagee, in and to the said premises, in manner and form as the said plaintiff hath in his said complaint alleged, or at all.

*No. 771.*iv. *Non-joinder of Assignee of the Mortgagor.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That after the execution of said mortgage in the complaint described, and on the day of 187., he, by deed duly executed, conveyed said mortgaged premises in fee to one R. S., who is now living and still holds said title.

*No. 772.*v. *No Equitable Assignment.*

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said A. B. did not assign or transfer to the said defendant the note in said mortgage mentioned, or the money due thereon, in manner or form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

*No. 773.*vi. *Equity of Redemption not Assigned.*

[TITLE.]

The defendant answers to the complaint, and denies:

That the said A. B. did convey his equity of redemption, in and to the said premises in said complaint described, in manner or form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

*No. 774.*vii. *Answer—Setting up a Judgment.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant, on the.....day of....., 187.., did recover, in the [state the court], in and for the county of....., aforesaid, a judgment against the said A. B., for the sum of.....dollars, his debt, and..... dollars, his costs in said action.

II. That the said judgment is in full force in law, and wholly due and unpaid, and is and has been a subsisting lien on said premises, from the said.....day of., 187...

CHAPTER II.

NUISANCES.

*No. 775.*i. *Denial of Plaintiff's Title.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not, is not now, and never was, possessed of the premises described in the complaint, or any part thereof.

*No. 776.*ii. *Denial of Nuisance.*

[TITLE.]

The defendant answers to the complaint:

That the defendant's premises have not been used as a slaughter-house, either as alleged or otherwise. Or: That defendant did not erect said [dam], as alleged, or otherwise, or at all.

1. Diversion of Water.—In an action to recover damages for the diversion of water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claim to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res adjudicata* in a subsequent suit: *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 145.

2. Irrelevant Allegations.—In an action to abate a nuisance caused by running a ditch for the conveyance of water across the land of the plaintiff, the defendant set up, in answer, that it was mineral land belonging to the

United States, and that the ditch was for mining purposes. Such allegations are irrelevant, and constitute no defense: *Weimer v. Lowrey*, 11 Cal. 104.

3. Issues Raised.—If the plaintiff sues to recover damages for flowing sand and sediment upon land averred in the complaint to be his, and the answer denies that plaintiff owns the land, and that defendant *wrongfully* flowed the sand and sediment upon the land, without denying that he caused the same to flow upon the land, it does not admit that defendant caused such material to flow upon the plaintiff's land: *Wood v. Richardson*, 35 Cal. 149. In such case, the plaintiff's ownership of the land is put in issue: *Id.*

4. Obstructing a Public Highway.—In the case of a commissioner suing the owner of the land for obstructing a public highway, it is the undoubted right of the defendant to question the legal existence of the highway. Such a right, however, cannot be asserted by him in any case in a justice's court. When called upon to plead, if he only intends to deny the fact that he placed the obstruction in the road, he may rely upon a general denial of the complaint. If he wishes to justify upon the ground that he had the right to put the fence across it, as owner of the land, he must allege that he is such owner; and this is sufficient to raise a question of title in a justice's court, for such an answer can mean nothing unless the defendant intends to question the public right of way over his land: *Little v. Denn*, 34 N. Y. 452.

5. Want of Care.—The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered in the breaking of defendant's dam: *Fraler v. Sears Union Water Co.*, 12 Cal. 555.

CHAPTER III.

PARTITION.

No. 777.

Pendency of Action to Dissolve Partnership.

[TITLE.]

The defendant answers to the complaint:

That the premises of which the plaintiff seeks partition were purchased by the plaintiff and defendant as partners, with partnership funds, and for partnership purposes in carrying on and conducting the business of [hardware merchants] as such partners, and the same is still so used for said purpose. And that prior to the commencement of this action, to wit, on the.....day of....., 187., this defendant commenced an action in the.....Court, against the plaintiff for a dissolution of said partnership and an

accounting, and which said action and accounting involves the real property described in the complaint, and which said action is still pending and undetermined.

1. **Answer—What to Contain.**—The defendants, who have been personally served with the summons, and a copy of the complaint, or who have appeared without such service, must set forth in their answer, fully and particularly, the nature and extent of their interest in the property; and if such defendants claim a lien upon the property, by mortgage, judgment, or otherwise, they shall state the original amount and date of the same, and the amount remaining due thereon, and whether the amount has been secured in any other way or not; and if secured, the extent and nature of the security, or they shall be deemed to have waived their right to such lien: Cal. Code C. P., sec. 758.

2. **Disclaimer.**—In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms: *De Uprey v. De Uprey*, 27 Cal. 331. A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer: *Id.*

3. **Form.**—For a fuller form, see *Danvers v. Dorrity*, 14 Abb. Pr. 206.

4. **Infant.**—Guardians *ad litem*, appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate: *Waterman v. Lawrence*, 19 Cal. 210. The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the court has no jurisdiction, except over the matter of partition: *Id.*

CHAPTER IV.

QUIETING TITLE.

No. 778.

- i. *Answer Containing Special Denial, Plea of Statute of Limitations, and Cross-complaint for Quieting Title.*

[TITLE.]

The defendant answers to the complaint:

First. For a first defense: [Deny specially each allegation.]

Second. And for a further and separate answer and defense:

I. The defendant alleges that the said plaintiffs claim that they are owners of said lots of land and premises in

complaint and hereinafter described, and claim title thereto as heirs and devisees of deceased.

II. That said R. P., in his life-time, to wit, in the month of, 187 . . . , conveyed, by a good and sufficient deed, to defendant's predecessors or grantors, in fee, the lots or tracts of land hereinafter described, and that after the making and delivery of said deed, said R. P. never had, nor have the plaintiffs or any of them since had, nor have they now, either as heirs or devisees of said R. P. or otherwise, any right, title, or interest in or to the said lands, or any part thereof.

III. That the said deeds so duly executed by said R. P., whereby the title of said R. P. to said lots of land was vested in this defendant's predecessors or grantors as aforesaid, were never recorded or filed for record, and were destroyed by fire on or about the day of, 187 . . .

Third. And for a further and separate answer and defense:

The defendant alleges, that he has been in the quiet and peaceable possession of the pieces or lots of land hereinafter described, holding and claiming the same adversely to the said plaintiffs, and adversely to all other persons, for more than five years before the commencement of this suit; and that neither the plaintiffs nor any of them, or either of their ancestors or ancestor, predecessors or grantors, was or were seised or possessed of the said lots of land, or either of them, or any portion of the same, within five years before the commencement of this action.

Fourth. And for a cross-complaint, the defendant alleges:

I. That he is now, and was at the commencement of this suit, and for more than five years before that time, and from thence up to that time, had been in the quiet and peaceable possession and occupancy of all those certain lots or pieces of land, situate, lying, and being in the City and County of, being the same lots in the complaint described, and bounded and described as follows, to wit: [give description of land.]

II. That the said plaintiffs have not, nor have either or any of them, any right, title, interest or right of possession in or to the said described premises, or any part thereof; that the said plaintiffs claim to have some right, title, interest, or right of possession in or to the said above-described

pieces and lots of land adverse to defendant, and claim that they are owners thereof, and claim title thereto, as heirs and devisees of R. P., deceased, as hereinbefore, to wit, in the second averment of the answer herein, is set out.

III. That said R. P. duly conveyed to defendant's predecessors or grantors, in fee, the lots or tracts of land hereinbefore described, as in the second averment of said answer set out, and defendant alleges that the said claim of the said plaintiffs to said lots of land, whatever it may be, is against the rights of this defendant, and is without foundation, and is a cloud upon defendant's title to said land and premises.

Wherefore defendant prays that the said plaintiffs, and every one of them, be adjudged to produce and bring forward any and all claims which they or either of them have or make upon the above-described lots, or any part thereof; and that the same may, by the decree of this Court, be declared invalid, and of no effect, and that the said plaintiffs be perpetually restrained and enjoined from setting up or making any claim to or upon the said premises; and that all such claims be quieted; and that this defendant be declared and adjudged the owner, and of right in the possession of the said premises and every part thereof, against any claim of the said plaintiffs or any of them; and that plaintiffs be adjudged to execute to this defendant a deed for said lots hereinbefore described, and in default so to do that a commissioner be appointed by this Honorable Court for that purpose; and for such other or further order, decree, or judgment, as may be just and equitable to defendant.

1. Equal Equities.—Where, in an action to quiet title to land, both parties show an equal equity, but one has also the legal title, he who has the legal title must prevail: *Maina v. Elliott*, 51 Cal. 8.

2. Insufficient Defense.—Where the defendant, in an action to quiet title to a mining claim on the public lands, set up in a supplemental answer both abandonment and forfeiture by the plaintiffs of their asserted title and possession to said claim after suit commenced, but failed to set up any subsequently acquired rights therein by defendants: *Held*, that said matters were unavailing to defendant as defenses to the action: *Pralus v. Pacific G. and S. M. Co.*, 35 Cal. 30.

3. Parties.—The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a

mortgage upon the property executed by them. *Held*, that the latter were unnecessary parties, as the grantee in the deed, and those claiming under him, were the only parties necessary to the complete adjudication of the case: *Peralta v. Simon*, 5 Cal. 313.

4. Possession.—If the answer in an action to quiet title admits plaintiff's ownership in fee-simple, and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possession by leave of defendant's tenant, he is not estopped from denying defendant's title: *Reed v. Calderwood*, 32 Cal. 109. If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant: *Reed v. Calderwood*, 32 Cal. 109. In an action to determine an adverse claim, the objection that the plaintiff had not, at the commencement of the action, actual possession of the premises, must be distinctly taken by the answer, and before going to trial on the merits, or it will be waived: *Jones v. Collins*, 16 Wis. 594.

No. 779.

ii. *Disclaimer.*

[TITLE]

The defendant answers to the complaint:

That he disclaims all right, title, and claim to any estate of inheritance or of freehold in the premises described.

CHAPTER V.

WASTE.

No. 780.

i. *Denial of Waste.*

[TITLE]

The defendant answers to the complaint, and alleges:

I. That defendant is not guilty of the waste and destruction aforesaid, in manner and form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

II. That defendant does not hold the said premises under and as tenant to the said plaintiff, in manner and form as the plaintiff in his complaint hath alleged, or at all.

III. That the said.....did not demise the said premises to the said....., in manner and form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

ANSWERS—SUBDIVISION SEVENTH.

For Specific Relief.

CHAPTER I.

CREDITOR'S ACTION.

No. 781.

i. Specific Denials.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That there is no record remaining in said court of such recovery as the plaintiff has alleged.

II. That the said A. B. has goods and chattels, lands, and tenements, liable to execution for the satisfaction of money due on the said judgment.

III. That the said A. B. has no goods or chattels or effects of the said plaintiff in his hands.

NOTE.—See note on p. 197, *ante*.

1. **Denial of Assignment.**—An allegation in the complaint that the assignment was made with the intent to hinder, delay, and defraud creditors, is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors: *Read v. Worthington*, 9 Bosw. 617.

2. **Denial that Conveyance was Fraudulent.**—That upon the making of the alleged assignment [or mortgage] there was an actual and continued change of the possession of the assigned [or mortgaged] property from the said [debtor] to the [transferees], who, immediately after the execution of the assignment [or mortgage], took actual and exclusive possession of the property; and that it has at all times since the assignment [or mortgage] remained in their exclusive protection and control: See *Churchill v. Bennett*, 8 How. Pr. 309.

3. **Denial of Possession of Assets.**—That he had not, at the commencement of this action, nor has he had at any time since, property of the defendant [debtor] in his possession or under his control, as alleged, or at all, or in any manner.

4. **Denial of Execution.**—That no execution upon the said judgment was ever returned unsatisfied in whole or in part [or was ever issued to the said] before this action.

5. **Denial of Judgment.**—That there is no record of the said judgment: Chitt. Forms, 108.

6. Defendant has Assets.—That the defendant [judgment debtor] has, and at the commencement of this action had, real property [or personal property, or both] in the county of, in this state, liable to execution, and sufficient in value to satisfy said judgment; to wit: [designating what].

7. Relief by Motion.—A complaint in an action to set aside a judgment, which contains no averment showing that relief could not have been obtained on motion, may be demurrable, but if defendant fails to demur, and answers on the merits, and the facts supplying the defect appear in the record, the objection is waived: *Bibend v. Kreutz*, 20 Cal. 109.

No. 782.

ii. *Bona Fide Purchaser.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff ought not to have his action aforesaid; because he avers that the said defendant did, on the day of, 187., buy of the said the said lands and tenements, *bona fide*, for the consideration of dollars, he, the said, being then seised in fee, and in possession thereof [here state how and when paid, and if notes were given, aver the giving of them], and without any fraud or intent to hinder, or delay, or defraud the said, or the other creditors of the said, and without any knowledge, information or belief, at that time or previous thereto, that the said sold the said premises with the intent charged in the said complaint.

8. Conditional Sale.—Where, on sale of personal property, "the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet, by express agreement, the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and, until performance, the right of property is not vested in the purchaser:" *Putnam v. Lamphier*, 36 Cal. 151. A second vendee is not entitled to stand in any better situation than his vendor, in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general naming of currency. Whether a further exception to the rule exists in favor of *bona fide* purchases from the purchaser at a conditional sale, is not decided: *Id.*

9. Consideration.—And it was also essential to state to whom the consideration was paid on the purchase: *Tompkins v. Ward*, 4 Sandf. Ch. 594.

10. Denial Positive.—The strict rule applied in chancery required that a party claiming as a *bona fide* purchaser, without notice, must deny notice positively, and not evasively, though it were not charged in the bill, and every fact from which notice might be inferred: *Frost v. Beekman*, 1 Johns. Ch. 288; *Denning v. Smith*, 3 Id. 332; *Gallatian v. Cunningham*, 8 Cow. 361; *Wyckoff v. Sniffen*, 2 Edw. 581. As to denial of notice to agent, see *Griffith v. Griffith*, 9 Paige, 315; *Hoffm.* 153.

11. Essential Averments.—Where a party desires in his plea or answer to claim that he was a *bona fide* purchaser for a valuable consideration, he should state the deed of purchase, with the date, parties, and contents, briefly; that the vendor was seised in fee, and in possession; the consideration, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; and how the grantor acquired title. Notice should be denied previous to and down to the time of paying the money, and the delivery of the deed: *Boone v. Chiles*, 10 Pet. 193. In a plea of purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver that the person who conveyed was seised, or pretended to be seised, at the time when he executed the purchase deeds: 2 Atk. 630; *Flagg v. Mann*, 2 Sumn. 486, 557.

12. Notice.—A plea denying notice "of the facts and circumstances charged" was evasive and insufficient, but was cured by a subsequent averment that the defendant was without notice "of the matters alleged, or any of them:" *Tompkins v. Anthon*, 4 Sandf. Ch. 97. The defendant must aver and prove, not only that he had no notice before his purchase, but that he had actually paid the purchase-money before such notice: *Jewett v. Palmer*, 7 Johns. Ch. 65.

13. Possession of Grantor.—It should be averred that the defendant's grantor was in the actual possession, or at least that the one under whom his grantor claimed was so: *Tompkins v. Anthon*, 4 Sandf. Ch. 97.

CHAPTER II.

DISSOLUTION OF PARTNERSHIP.

No. 783.

i. *That the Term is not Expired.*

[TITLE.]

The defendant answers to the complaint:

That the partnership between him and the plaintiff, set forth in the complaint, was not upon the terms and according to the stipulations, agreements, or covenants alleged by plaintiff in his said complaint; but, on the contrary, that said partnership was formed, and entered into, and carried on, under and in pursuance of a written agreement, and articles of copartnership between him and said plaintiff; a copy of which is hereto annexed, and forms a part of this answer, showing that the time for the continuance of said copartnership is not yet expired, which agreement has never been altered or varied in writing or by parol; and that the copartnership formed and carried on in pursuance thereof is the same set forth and alleged in said complaint.

NOTE.—This form is from 2 Van Santv. Eq. Pr. 579.

1. Construction of Articles.—In an action between partners, for an accounting, the complaint alleged, and the articles of agreement which were set forth in the complaint stated, that the plaintiff contributed two thousand two hundred and fifty dollars to the capital of the firm, which sum, the complaint alleged, the defendant had converted to his own use. The answer denied that the two thousand two hundred and fifty dollars was contributed as capital; and averred that it was to be paid by the plaintiff for an equal interest in the business; that the money was paid on that basis; and that both parties have acted upon the understanding that such was the meaning of the articles: *Held*, sufficient to present the issue, whether the articles were by mistake so drawn as not to express the actual agreement of both parties: *Isles v. Tucker*, 5 Duer, 393.

No. 784.

ii. *Overdrawing Done by Plaintiff's Assent.*

[TITLE.]

The defendant answers to the complaint:

That he denies each and every allegation set forth in the [third separate cause of action in] said complaint, relative to the alleged misconduct of defendant, and his alleged acts and doings in the management of the said partnership business, except the allegation of his drawing out from the funds of said copartnership more than his portion of the profits thereof; to wit, the sum of dollars, and investing the same, in, etc.; and as to such allegation, defendant alleges and states that it was done with the full knowledge of said plaintiff, and with his approbation and express assent.

2. Judgment, when a Bar.—Judgment for winding up affairs of corporation no bar to suit to enforce individual responsibility of shareholder: *Diven v. Duncan*, 41 Barb. 520. Suit for injunction to restrain debtor from making assignment in violation of agreement, does not preclude action upon debt itself: *Paige v. Wilson*, 8 Bosw. 294.

CHAPTER III.

ACTIONS FOR DIVORCE.

No. 785.

i. *General Denial.*

[TITLE.]

The defendant answers to the complaint:

And admits the marriage alleged in the complaint, but denies each and every other allegation of said complaint.

1. Desertion.—A wife, having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. The husband never thereafter sought to resume cohabitation, nor did the wife, and it was not resumed: *Held*, that these facts did not constitute desertion by the husband: *Fitzgerald v. Fitzgerald*, L. R. 1 P. & D. 694; see *ante*, p. 235, note 36.

No. 786.

ii. *Denial of Adultery, and Cross-complaint.*

[TITLE.]

The defendant answers to the complaint:

First, For a defense:

That he never committed adultery with the person named in said complaint, or with any other person, at any time or place, or at all.

Second, For a second defense, and cross-complaint, the defendant alleges:

[Allege acts of adultery as in Form No. 495.]

Wherefore the defendant demands judgment, etc. [as in that form.]

NOTE.—See *ante*, pp. 229–235.

1. Inhabitaney.—An answer setting up plaintiff's adultery merely as a defense need not allege the inhabitaney of the parties, or either of them, at the time of the offense, as is necessary in a complaint: *Lesueur v. Lesueur*, 31 Barb. 330. But that the offense was committed without the defendant's procurement, connivance, privity, or consent, are essential in such an answer: *Morrell v. Morrell*, 3 Barb. 236; *Anonymous*, 17 Abb. Pr. 48.

2. Insanity of Plaintiff.—In an action for a decree of the nullity of the marriage, the defendant cannot have leave to allege, by way of amendment, that plaintiff was insane at the commencement of the action, for this is not an issuable fact: *Appleton v. Warner*, 51 Barb. 270.

3. Limitation.—In an action for a divorce, the physical incapacity of the plaintiff to enter into the marriage relation, is not, after two years from the date of the marriage, a defense: *Griffin v. Griffin*, 23 How. Pr. 183. This objection can only be taken by answer, and is applicable to actions for divorce: *Bihin v. Bihin*, 17 Abb. Pr. 19. So where a complaint averred acts of cruelty committed more than ten years before, and the defense was not interposed in the answer, evidence of such cruelty was admissible: *Id.*

4. Marriage must be Denied.—If the complaint in an action to obtain a divorce avers the marriage of the plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purposes of the trial, and the marriage need not be proved: *Fox v. Fox*, 25 Cal. 587.

5. Recrimination.—Adultery committed by the plaintiff is a perfect defense to an action for an absolute divorce, and is also a ground for affirmative relief in the same action: *Anon.*, 17 Abb. Pr. 48; *B. v. B.*, N. Y. Leg. Obs. 350. The doctrine of recrimination, or *compensatio criminum*, applicable in suits for divorce, and the several offenses which, by the statute constitute grounds of divorce, are pleadable in bar to such suits, the one to the other,

within the principle of the doctrine: *Conant v. Conant*, 10 Cal. 249; *Leseuer v. Leseuer*, 31 Barb. 330. To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant: *Conant v. Conant*, 10 Cal. 249; Cal. Civ. Code, secs. 122, 123. In a husband's suit for divorce for the wife's adultery, his adultery cannot be set up under the Code of New York as a counter-claim, and if proved, will not entitle her to a divorce: *R. F. H. v. S. H.*, 40 Barb. 9; see, however, *Anon.*, 17 Abb. Pr. 48.

6. Residence.—In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessities of life for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit: *Washburn v. Washburn*, 9 Cal. 475.

No. 787.

iii. Condonation.

[TITLE.]

The defendant answers to the complaint:

I. That after the time mentioned in the complaint, and before this action, the plaintiff being informed, as to the matters therein alleged, freely condoned said alleged adultery, and forgave the defendant thereof [and freely cohabited with him].

II. That ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

7. Must be Specially Pleading.—Condonation must be specially pleaded: *Smith v. Smith*, 4 Paige, 432; *Morrell v. Morrell*, 3 Barb. 236. This defense may be joined with a denial of the adultery charged, and also with a defense charging the plaintiff with adultery as a bar: *Smith v. Smith*, 4 Paige, 432; *Wood v. Wood*, 2 Id. 108; *Hopper v. Hopper*, 11 Id. 46, see also, *ante* p. 231 N. 11.

CHAPTER IV.

FOR FRAUD.

No. 788.

i. Denial of Fraud.

[TITLE.]

The defendant answers to the complaint, and denies:

That he obtained the said deed from the plaintiff by fraud or misrepresentation [deny specific acts alleged].

*No. 789.**ii. Denial of Mistake.*

[TITLE.]

The defendant answers to the complaint, and denies:

That there are errors or mistakes in the stating of the said account, as alleged, or at all, but alleges that the account stated which is mentioned in the complaint, is correct, true and just.

CHAPTER V.

USURPATION OF OFFICE.

*No. 790.**General Denial.*

[TITLE.]

The defendant answers to the complaint, and denies generally and specifically each and every allegation in the complaint contained.

NOTE.—If the complaint be sworn to the answer must deny specifically each allegation controverted; see also generally, *ante*, page 308 *et seq.*

1. **Right of Office.**—A plea to a *quo warranto*, that the defendants have a right to exercise the franchise, accompanied by a negation of the allegations of the writ, is not a plea of *non usurpavit*, or a disclaimer, but is a valid plea: *Commonwealth v. Cross Cut R. R.*, 53 Penn. 62. The defendant in an action to try the right to an office may set forth in his answer more than one defense: *People v. Stratton*, 28 Cal. 382.

2. **Ineligibility no Defense.**—In a proceeding to contest the election of defendant as district judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense; because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office: *Saunders v. Haynes*, 13 Cal. 145. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible does not give the office to the next highest on the list: *Id.*

3. **Justification.**—In *quo warranto* cases, if the defendant does not disclaim holding the office, he must justify, and his plea of justification must show all the facts necessary to establish the lawful right of the respondent to the office in question; and the burden of maintaining it is on the respondent: *Larke v. Crawford*, 28 Mich. 88.

CHAPTER VI.

SPECIFIC PERFORMANCE OF CONTRACT.

*No. 791.**i. Denials.*

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That he did not contract and agree with the said plaintiff, in manner or form as alleged in the complaint, or in any manner or form, or at all.

II. That the said plaintiff did not pay to the said defendant the said sum of dollars, in manner and form as he alleges, or at all.

III. That the said plaintiff did not tender the said sum of dollars to the defendant, at the time alleged, or at any time.

IV. That said plaintiff did not put said defendant into the possession of the said premises, at the time stated, or at any time, or in any manner.

V. That the said plaintiff was not seised in fee of the said premises, and could not make to the said defendant a good and sufficient title thereto, as by his said contract he was bound to do, but on the contrary [state incumbrances—this answer like all answers must be made according to the facts of each particular case.]

*No. 792.**ii. Denial of Readiness to Convey.*

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not ready or willing to convey the premises, as alleged, or to convey them at all.

*No. 793.**iii. Performance.*

[TITLE.]

The defendant answers to the complaint:

I. That he duly performed said contract upon his part, in all things.

II. [State facts showing performance.]

*No. 794.*iv. *Denial of Part Performance.*

[TITLE.]

The defendant answers to the complaint:

That the said A. B. did not take possession of the said premises, or do the said acts, or make the said improvements thereon, alleged, nor has he in any part performed the alleged contract.

*No. 795.*v. *A Demand After the Plaintiff's Tender.*

[TITLE.]

The defendant answers to the complaint:

I. That after the making of the tender alleged, and on the day of, 187 . . . , at, the defendant requested the plaintiff to pay him said sum.

II. That the plaintiff then and ever since refused to pay the same.

NOTE.—For the provisions of the civil code of Cal. as to what contracts may and what may not be specifically enforced, see Cal. Civ. Code, secs. 3384 to 3395. See, also, generally on this subject, *ante*, p. 292 *et seq.*

1. **Increased Value.**—If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services, the fact that the property afterward is largely enhanced in value is no objection to a decree for specific performance, even though such enhancement is in a material degree the result of the labor and money of the client: *Howard v. Throckmorton*, 48 Cal. 482.

2. **Insurance Policy.**—If on a bill in equity for specific performance of a contract, for a policy of insurance, the answer admit that a proposal for acceptance was made and accepted, but adds that no contract was made, the court will not intend that this denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequence of the facts admitted: *Union Mut. Ins. Co. v. Commercial Mut. Ins. Co.*, 2 Curt. C. Ct. 524; S. C., 8 Law Rep. (N. S.) 610.

3. **Statute of Frauds.**—A general demurrer interposed as a plea of the statute of frauds to a bill for specific performance, must be overruled where the facts stated in the bill are not inconsistent with the signing of the contract and the bill expressly alleges a part performance: *Field v. Hutchinson*, 1 Beav. 599; *Child v. Godolphin*, 1 Dick. 39. Where the answer admits an agreement, the defendant must plead the statute, or he is taken to have admitted the agreement, which is either good under the statute, or on some other ground binding upon him: *Cruyston v. Banes*, Prec. Ch. 208; *Symondson v. Tweed*, Id. 374. And notwithstanding his admission, the defendant is entitled to the full benefit of the statute: *Rowe v. Teed*, 15 Ves. 375; *Blagden v. Bredhear*, 12 Ves. 466; see, *contra*, *Mussell v. Cooke*, Prec. Ch. 533. But the answer, with the admission, must be to the original bill: *Spurrer v. Fitzgerald*, 6 Ves. 548; *Beatson v. Nicholson*, 6 Jur. 621. And the answer must

distinctly claim the benefit of the statute: *Skinner v. McDouall*, 2 DeG. & Sm. 265.

4. Marriage.—When a married woman has, prior to her marriage, entered into a contract which is binding upon her, a specific performance may be decreed notwithstanding her subsequent marriage: *Love v. Watkins*, 40 Cal. 547.

5. Objection to Deed.—Where, in pursuance of an agreement to convey real estate, the grantee presents a deed different from that called for in the contract, the grantor must make his objections at the time it is presented, or within a reasonable time afterwards, or when the possession is demanded. He cannot be permitted to avail himself of it, for the first time, as a defense when sued for breach of covenant: *Morgan v. Stearns*, 40 Cal. 434.

6. Re-conveyance of Property.—If the grantee of land agrees by parol with the grantor that he may keep the land and work it one year, and at the end of the year make his election whether he will keep it and pay the purchase-money, or restore it to the grantor, the grantee is in time to avoid payment of the purchase-money, if on the first day after the end of the year he notifies the grantor of his election, and tenders him or his agent a deed of the property: *Rhine v. Ellen*, 36 Cal. 362.

No. 796.

vi. Rescission of Contract.

[TITLE.]

The defendant answers to the complaint:

That after the contract alleged in the complaint, and before any breach thereof, it was agreed by and between the plaintiff and the defendant that the said contract should be waived, abandoned, and rescinded; and they then waived, abandoned, and rescinded the same accordingly.

7. Form of Averment.—If the only materiality of the date is that it was after another event, this mode of stating it is sufficient: *Kellogg v. Baker*, 15 Abb. Pr. 286; see, also, *Bullen & L. F.* 395.

ANSWERS—SUBDIVISION EIGHTH.

In Statutory Actions.

CHAPTER I.

FOR FORCIBLE ENTRY AND UNLAWFUL DETAINER.

No. 797.

i. For Forcible Entry and Detainer.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That plaintiff was, at the time stated, or at any time, in the actual or peaceable or exclusive possession of the property described in the complaint, or any part thereof.

II. Denies that defendant broke into the premises of the plaintiff, as alleged, or in any manner, or at all.

III. Denies that plaintiff suffered any damage by such alleged breaking, or in any manner, or by any means, either as alleged in the complaint or at all. [Traverse the allegations of the complaint specially.]

1. **Demand.**—A demand for the surrender of the possession, and a refusal for the period of five days, are essential in order to constitute a constructive forcible detainer, defined by the third section of the act: (Cal. Code C. P., sec. 1160, sub. 2); *Brawley v. Riedon Iron Works*, 38 Cal. 676.

2. **Easement.**—In forcible entry upon land, an answer that the defendants entered as the servants of a specified railroad company, which had legally appropriated the injured property as the line of its road, would justify the entry and bar the suit: *Green v. Boody*, 21 Ind. 10.

3. **Entry under Law.**—The defendant may show that the lands described in the complaint are public lands of the United States, and that he entered on a portion thereof, specifically describing the part entered on under and by virtue of the act of legislature prescribing the mode of maintaining possessory actions on public lands, and that the lands so entered on are lands to which the plaintiff has no right of property or possession, and no title to, or interest therein, etc.: *Buel v. Frazier*, 38 Cal. 693.

4. **Eviction.**—In an action by a landlord against his tenant, under the thirteenth section of the forcible entry and unlawful detainer act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding, of which proper notice was given to the landlord: *Wheelock v. Warschauer*, 21 Cal. 309. Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant;

and to relieve the latter from the obligation of his tenancy: *Id.* The rule which estops a tenant from disputing his landlord's title does not prevent him from showing that the tenancy has been determined, and he may treat an eviction with notice, by one having an adverse title, as a termination of the tenancy, and thus resist any claim by the landlord, either for rent or possession: *Id.* The notice by a tenant to his landlord of proceedings to evict him may be oral: *Id.* An eviction of a tenant by title, both legal and paramount to that of the landlord, must of necessity determine the tenancy, and when the title of the landlord is set up in defense of the action, and the landlord appears and defends the action at the request of the tenant, and in his name, he cannot be heard to say in a contest with the tenant that the tenant was not evicted by paramount title: *Wheelock v. Warschauer*, 34 Cal. 265.

5. General Denial.—Where in a case in justices' court the complaint verified alleges such a demand, and the answer verified, instead of specifically denying the allegation, denies generally "each and every allegation" in the complaint: *Held*, that this general denial put plaintiff on proof of demand, and of everything necessary to maintain the action: *Sullivan v. Cary*, 17 Cal. 80. A general denial is no longer sufficient. But under the old practice in an action of forcible entry and detainer, all matters of legal excuse, justification, or avoidance, could be given in evidence by the defendant, under a general denial of the allegations of the complaint: *Watson v. Whitney*, 23 Cal. 375; but see *More v. Del Valle*, 28 Id. 172.

6. Insufficient Defense.—Proof of prior possession of the premises in controversy does not constitute a defense to this action: *Brown v. Perry*, 39 Cal. 23. The denial that the plaintiff owned the buildings on the premises in controversy does not raise an issue that can be tried in an action of forcible entry and detainer. So, new matter pleaded by defendant in respect to the lease of the premises to the plaintiff, its expiration, and the subsequent forcible and fraudulent entry and detainer by the plaintiff, his attempt to place others in possession, and the claim of the defendant against the plaintiff for the rent of the premises, do not constitute a defense to the action. A set-off is not admissible in actions of this class, and it makes no difference whether it is a demand for money or a previous forcible entry of the plaintiff: *Warburton v. Doble*, 38 Cal. 619.

7. Leave and License.—An agreement made by the landlord with the tenant, after the expiration of the lease, that the tenant shall have possession of the premises one year longer, paying therefor a stipulated rent, to be paid if the land is included in a certain survey, vests in the tenant the present right to possess the lands until the expiration of the agreement, and, if pleaded, is admissible in evidence as a defense to an action for holding over, brought before the expiration of the time specified in the agreement: *Uridias v. Morrell*, 25 Cal. 35. It seems that evidence showing the acquiescence of the plaintiff in the defendant's acts is admissible under an answer denying the allegation that the acts were done without consent of the plaintiff, and by force, etc.; but if not, the objection must be taken at the trial, and is not available on appeal: *Rowan v. Kelsey*, 2 Keyes, 594.

8. Right of Possession.—If the party guilty of a forcible entry has any title or right of possession, his title or right of possession cannot be tried in an action of forcible entry and detainer. He must first deliver up the possession forcibly acquired, and then he may litigate his title or right to posses-

sion in a proper action: *Mitchell v. Davis*, 23 Cal. 381. If D. and H. are in the peaceable possession of a lot of land, and S. and S., accompanied by others, their employees, forcibly evict them therefrom and take possession, and then lease the lot to R., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess R. and take possession, and R. brings an action for forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and S. in defense: *Reff v. Duane*, 27 Cal. 568. The person whose occupancy of land is through his servants, and who has never been in possession, cannot maintain an action for an unlawful entry made during his temporary absence, and a refusal to surrender possession: *Hammel v. Zobelein*, 51 Cal. 532.

9. Title Terminated.—A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of facts or fraud: *McDewitt v. Sullivan*, 8 Cal. 592; *Teoksbury v. Magraff*, 33 Cal. 237. If a tenant is evicted by his landlord from a substantial part of the premises, but still continues to occupy the remainder under the lease, the landlord cannot, under the unlawful detainer act, recover possession from the tenant by reason of non-payment of rent while the eviction continues: *Skaggs v. Emerson*, 50 Id. 3. The time during which the tenant was to occupy the land must have expired before demand is made for the possession: *Rogers v. Hackett*, 49 Id. 121. The fact that the agreement under which the defendant occupies is a verbal one, and that by its terms it was to continue two years, does not change the rule: Id. A partnership between the lessor and lessee in the occupation of the leased property may be proved as a defense to an action by the lessor to recover possession: *Pico v. Cuyas*, 47 Id. 174.

10. Claim to, and Possession of.—If a complaint in an action to recover judgment for taxes avers that the tax is an assessment of defendants' "claim to and possession of" lands, an answer setting up as new matter that the lands are public lands of the United States contains no defense: *People v. Frisbie*, 31 Cal. 146.

PART FIFTH.

PROCEEDINGS TO OBTAIN JURISDICTION.

CHAPTER I.

SUMMONS.

1. In ordinary terms, a summons is a command to appear. In our state, it is a notice to defendant that an action has been commenced against him. It informs defendant who has commenced the action, where it is brought, in what court it is brought, the relief demanded, and that, if he fails to answer within ten days, or in such other time, depending upon where the summons is served, default will be taken against him.

2. In California, the summons always follows the complaint, and is only issued after the filing of a complaint; but in many states the summons precedes the complaint, and the issuance of it is the first step, or commencement, of the action; but here the action is commenced by "filing a complaint" in the court where the action is brought: Cal. Code C. P. sec. 405. In England, all personal actions are brought by one uniform writ of summons, which is issued out of the court where the action is brought, and directed to the defendant, commanding him to cause an appearance to be entered within a certain number of days after the writ is served, formerly eight: 3 Steph. Com. 566.

3. In California, the summons may be issued at any time within one year after filing the complaint: Cal. Code C. P. sec. 406. Since the amendment of 1860, the clerk is not authorized to issue a summons after the expiration of a year after filing the complaint, without an order of the court; and if the court is authorized to order the issuance of a sum-

mons after that period, the exercise of the power rests in its discretion: *Dupuy v. Shear*, 29 Cal. 238; and an order of the court striking out the complaint, where no service was had on the defendant until nine years had elapsed, was not an abuse of discretion: *Id.* Unless the summons and a certified copy of the complaint, duly attested and in condition to serve, are placed at the disposal of plaintiff for service within one year from the filing of the complaint, the action should be dismissed: *Reynolds v. Page*, 35 Cal. 296. Unless this be done, the summons is not issued, within the meaning of section 23 of the practice act: *Id.* The dismissal of the action is a question for the sound discretion of the court; *Grigsby v. Napa Co.*, 36 *Id.* 585; *Carpentier v. Minturn*, 39 *Id.* 450; *Eldridge v. McKay*, 45 *Id.* 50; and see Code C. P. sec. 594; *Lander v. Flemming*, 47 Cal. 614.

4. The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court: Cal. Code C. P. sec. 407. At the time of the issuance of summons, the clerk is required to indorse on the summons the names of plaintiff's attorneys: *Id.* In New York, the summons must be subscribed by the plaintiff or his attorney; N. Y. Code, sec. 417. But that printed subscription is sufficient, see *Brainerd v. Heydrick*, 32 How. Pr. 97. As to waiver of the indorsement by appearance, see *Sprague v. Irwin*, 27 How. Pr. 51.

STYLE OF PROCESS.

5. The style of all process shall be: "The People of the State of California:" Const. Cal., Art. VI, Sec. 18; Pol. Code, Sec. 30. At the head of a summons was written, "District Court of the Fourth Judicial District," but the summons was issued from the County Court, and tested by the County Judge: *Held*, that the words at the top of the summons, "District Court," etc., was no part of the writ: *Crane v. Brennan*, 3 Cal. 195.

6. The summons shall state: First. The names of the parties to the action; the court in which it is brought, and the county in which the complaint is filed: Cal. Code C. P., sec. 407. The summons must state the names of all the parties to the action. If there are several defendants, it is

not sufficient to give the name of one followed by "*et al.*" This section is mandatory, and not directory merely: *Lyman v. Milton*, 44 Cal. 630. Section 1046 of the Code C. P. refers only to the *title* of the paper. Whether it will apply to the summons, *query*. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and may then designate him by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly: *Id.*, sec. 474. Where there is no allegation that the name of a defendant is unknown, there is no foundation for the bringing of the action against a fictitious person, and consequently no authority to make service of the summons by publication: *People v. Herman*, 45 Cal. 692. If a defendant, who is sued by a fictitious name, appears and answers by his true name, it is not necessary that the summons should be amended by inserting the true name, since the appearance is a waiver of any defect in the summons, or of any summons at all. But the complaint must be amended or the judgment will be irregular, though not void: *Campbell v. Adams*, 50 *Id.* 205. But such judgment will be reversed on appeal: *Baldwin v. Morgan*, *Id.* 585. Appearance and answer by defendant is not a waiver of such amendment: *McKinlay v. Tuttle*, 42 *Id.* 577. If the name by which a party is known be inserted it is sufficient: *Cooper v. Burr*, 45 Barb. 9; *Miller v. Stettiner*, 7 Bosw. 692. Where a party sues or is sued in a representative character, the character should be stated after his name in the summons: 1 Arch. Pl. 81. Where the summons describes the plaintiff as administrator, and in the complaint he is represented as suing in his individual capacity, and for a demand in his own right, it was held a fatal variance: *Blanchard v. Strait*, 8 How. Pr. 83. A summons which does not name the court is not void: *Tallman v. Hinman*, 10 How. Pr. 89; as a defendant on whom both summons and complaint have been served cannot object that the summons does not name the court if the complaint does: *Yates v. Blodgett*, 8 How. Pr. 278; *Webb v. Mott*, 6 *Id.* 439; *Hewitt v. Howell*, 8 *Id.* 346. Where the summons was headed with the words, "District Court," but was issued out of the county court, under the county court seal, and attested by the judge of said court, it was held

good as the writ of the county court: *Crane v. Brennan*, 3 Cal. 192.

7. It shall state, Second. The cause and general nature of the action. If the sum sued for is certain in amount, or capable of being reduced to certainty by computation, the summons must state the amount for which judgment is demanded: *People v. Bennett*, 6 Abb. Pr. 343. And if radically defective in this respect, it will not support a judgment by default: *People v. Woodlief*, 2 Cal. 242; *Porter v. Herman*, 8 Id. 625. In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint: *Calderwood v. Brooks*, 28 Cal. 151; as a copy of the complaint need be served on only one of several defendants, where they all reside in the same county, and a reference in the summons to the complaint makes it a part of the summons for the purpose of describing the premises: Id.; Cal. Code C. P., sec. 410. The requisites of the summons are fixed by statute: Consult Cal. Code C. P., sec. 407; Code of Oregon, sec. 51; Wash. T., sec. 40; Arizona, sec. 24; Idaho, sec. 24; Iowa, sec. 2,812; 1 N.Y. Code, sec. 128; Nash's Ohio Pl., 19.

8. It shall contain, Third. "A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county, but in the district in which the action is brought; and within forty days, if served elsewhere:" Cal. Code C. P., sec. 407. The time for appearance may be extended: Cal. Code C. P., sec. 1,054. If judgment by default is entered before the time fixed for answering expires, it will be reversed on appeal: *Burt v. Scranton*, 1 Cal. 416. A non-resident of the state, served out of the state, has forty days in which to appear: *Grewell v. Henderson*, 5 Id. 466. In *McCauley v. Fulton*, 44 Id. 360, it was held that where the district comprised but one county, the omission from the summons of the words, "within twenty days, if served out of the county,

but within the district," etc., these words had no application, and the omission did not invalidate the summons.

9. There shall be inserted in the summons a notice, first, in actions arising on contracts for the recovery of money or damages only, that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint [stating it]: Cal Code C. P., sec. 407, subd. 4. A statement in a summons, that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-four dollars and twelve cents, and interest at three per cent. per month from November 14, 1863, and the further sum of eleven dollars and twenty cents, and the costs of this action, is sufficient to answer the requirements of section 24 of the Practice Act (corresponding substantially to section 407 of the Code C. P.), as a copy of the complaint is served with the summons, and the defendants are thus notified of the general nature and object of the action: *King v. Blood*, 41 Cal. 317. Relief under this subdivision must be applied only to actions for a definite sum of money as such, and without calling upon the Court to ascertain or adjudge anything but the existence or terms of the contract: *Tuttle v. Smith*, 6 Abb. Pr. 329; S. C., 14 How. Pr. 395; approved, *People v. Bennett*, 6 Abb. Pr. 343; *Luling v. Stanton*, 8 Id. 378; *Cobb v. Dunkin*, 19 How. Pr. 164; reversing S. C., 17 Id. 97; *Cook v. Pomeroy*, 10 How. Pr. 103, being overruled; see, also, *Norton v. Cary*, 14 Abb. Pr. 364; S. C., 23 How. Pr. 469. Thus, in cases for goods sold and delivered: *Diblee v. Mason*, 1 Code R. 37. For liquidated damages on breach of contract: *Hyde Park v. Teller*, 8 How. Pr. 504. For specific sum on breach of contract: *Croden v. Drew*, 3 Duer, 654. For penalty given by statute: *People v. Bennett*, 5 Abb. Pr. 384; *Commrs. of Albany v. Classon*, 17 How. Pr. 193. For money demand where the plaintiff waives tort: *Goff v. Edgerton*, 18 Abb. Pr. 381. So, an action on an undertaking in replevin is substantially one for the payment of money, and a summons for a money demand in such a case is proper: *Montegriffo v. Musti*, 1 Daly, 77.

10. In other actions there shall be inserted: Fifth. That if the defendant fail to appear and answer the complaint, the plaintiff will apply to the court for the relief demanded

therein: Cal. Code C. P., sec. 407. The notice in the summons should, however, contain a reference to the complaint: *Foster v. Wood*, 30 How. Pr. 284; S. C., 1 Abb. Pr. (N. S.) 150. In the summons, as in all legal proceedings, such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner: Cal. Code C. P., sec. 186.

AMENDMENT OF SUMMONS.

11. "Every court has power: 8. To amend and control its process and orders, so as to make them conformable to law and justice:" Cal. Code C. P., sec. 128; see, also, Id. 473. The court may allow the summons to be amended, by inserting a notice to the defendant of the nature of the demand, and that, unless he appear and answer within the time specified, judgment by default will be taken against him: *Pollock v. Hunt*, 2 Cal. 194. But amendments can only be made by order of the court upon motion: *McCrane v. Moulton*, 3 Sand. 736; *Allen v. Allen*, 14 How. Pr. 248. Sheriffs have no right, after making a return, to amend it, so as to affect rights which have already vested in third parties: *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Id. 25. But courts should exercise great liberality in allowing sheriffs to amend so as to make returns conform to facts, and to correct errors and mistakes: *Gavitt v. Doub*, 23 Cal. 79.

SERVICE OF SUMMONS.

12. After the issuance of the summons by the clerk, the next step is to have it properly served, together with a copy of the complaint. Allowing an action to rest without serving the summons for two years and eight months after the summons is issued, is such a want of diligence as to justify the court in dismissing the action: *Grigsby v. Napa Co.*, 36 Cal. 585. If notice is given of a motion to dismiss an action for want of prosecution before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up, the entry of the default does not preclude the court from dismissing the action. The dismissal takes effect by relation back to the time of the service of the motion: Id.; see par. 3, *ante*.

13. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants: Cal. Code C. P., sec. 414; see, also, Id. sec. 579. So, where S. and B. admitted "due service" of summons in an action against them and others, the court thereby acquired jurisdiction of them, and as to them the judgment was valid: *Sharp v. Brunnings*, 35 Cal. 528. Any writ or order and all other papers, in any civil suit or proceeding, may be served by telegraph: Cal. Code C. P., sec. 1017. In Oregon, service of complaint and notice upon a defendant before the same are filed in the office of the clerk of the court, is a good service: *Keith v. Quinney*, 1 Or. 364.

SERVICE, BY WHOM MADE.

14. The summons may be served by the sheriff of the county where the defendant is found, or by any other person, over the age of eighteen, not a party to the action: Cal. Code C. P., sec. 410. A copy of the complaint must be served with the summons, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants: Id. When the summons is served by the sheriff, it must be returned, with his certificate of service, and of the service of any copy of the complaint where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served: Id. The service of a summons by a person not a sheriff, is "according to the course of the common law:" *Peck v. Strauss*, 33 Cal. 683.

SERVICE, UPON WHOM MADE.

15. The summons must be served by delivering a copy thereof to the defendant personally, except in the following instances: 1. In a suit against a corporation; 2. In a suit against a minor under the age of fourteen years; 3. In an action brought against an insane person. In the three

excepted cases, the summons must be served on the person designated in the statute (Cal. Code C. P., sec. 411) instead of the person sued in the action. That is to say, if the suit is against a domestic corporation, by delivery of a copy of summons "to the president or other head of the corporation, secretary (*Gillig v. Indep. G. and S. M. Co.*, 1 Nev. 247), cashier, or managing agent thereof:" *Aiken v. Quartz Rock Co.*, 6 Cal. 186; service was made upon M. as president and C. as secretary: *Held*, sufficient without proof beyond the mere return that those persons were such officers: *Rowe v. Table Mt. W. Co.*, 10 Cal. 444. Service "upon James Street, one of the proprietors of the company," held insufficient to give the court jurisdiction: *O'Brien v. Shaws Flat & T. C. Co.*, Id. 343. If against a foreign corporation, or a non-resident joint-stock company, etc., doing business and having a managing or business agent, cashier, or secretary within this state, upon such cashier, agent or secretary: Cal. Code C. P., sec. 411.

16. If against a county, city, or town, to the president of the board of supervisors, president of the council, or trustees, or other head of the legislative department thereof: Cal. Code C. P., sec. 411. Where there are two parties who make adverse claim to be officers of such corporation, the proper person to be served is the officer *de facto*, the one having possession: *Berrian v. Metho. So. in N. Y.*, 4 Abb. Pr. 424; see 10 Cal. 444, cited in preceding paragraph. A baggage master, or one who merely sells tickets, is not "managing agent" of a railroad company: *Flynn v. Huds. Riv. R. R. Co.*, 6 How. Pr. 308. A person acting under power of attorney for an insurance company located elsewhere is a "managing agent:" *Bain v. Globe Ins. C.*, 9 How. Pr. 448. As to sufficiency of service of summons on a corporation by the laws of Oregon, see Laws of Oregon, 1866, p. 9.

17. If against a minor under the age of fourteen years, residing within this state, to such minor personally, and, also, to his father, mother, guardian, or if there be none such within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed: Cal. Code C. P., sec. 411. The sheriff's certificate that he served the summons and com-

plaint, by leaving a copy at the place of residence of the defendant, with a white person over the age of fourteen, who was residing with the family, is sufficient service of summons in Oregon: *Laws of Oregon of 1866*, p. 98.

18. If against a person judicially declared to be of unsound mind, service must be made by delivering a copy to such person, and also to his guardian, if a guardian has been appointed: *Cal. Code C. P.*, sec. 411. In New York, service of summons on an insane person who has no committee, must be by personal service on such person: *Heller v. Heller*, 1 Code R. (N. S.) 390; 6 How. Pr. 194.

19. Where two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates: *Cal. Code C. P.*, sec. 388; consult *Mulliken v. Hull*, 5 Cal. 246; *Welch v. Kirkpatrick*, 30 Id. 204; *King v. Randlett*, 33 Id. 321; *Hammond v. The People*, 32 Ill. 446.

SERVICE, HOW MADE.

20. Under the Practice Act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the court, and delivering a copy: *Edmondson v. Mason*, 16 Cal. 386; *People v. Bernal*, 43 Id. 385. A summons cannot be served upon defendant's attorney in fact: *Drake v. Drevenick*, 45 Cal. 455. Putting the defendant in unknown possession of a summons disguised and enveloped, is not a good service of summons: *Bulkeley v. Bulkeley*, 6 Abb. Pr. 307. Where defendant refuses to accept the summons, service may be made by "laying it down at any appropriate place in his possession:" *Davison v. Baker*, 24 How. Pr. 39. But forcibly thrusting it upon him is improper: *Id.* Where, however, a defendant refused to receive a process, it was held that laying it on his shoulder was good service: *Bell v. Vincent*, 7 D. & R. 233. If a copy of the summons, and a certified copy of the complaint, are personally delivered to the defendant, and issued from a court of general jurisdiction, the court thereby acquired jurisdiction of the person of the de-

fendant. An irregularity in the mode of delivery is merely a ground of application to the court to set aside the summons: *Peck v. Strauss*, 33 Cal. 678. For the mode of transmitting summons, and other writs, orders, papers, etc., by telegraph, for service in any place, and mode of service and return, see Cal. Code C. P., sec. 1017.

SERVICE BY PUBLICATION.

21. The statute provides how service of summons may be made by publication. This mode of service may be resorted to in four classes of cases only, to wit: 1. When defendant resides out of the state; 2. When defendant has departed from the state; 3. When defendant cannot be found within the state, or when he conceals himself to avoid service; 4. When the defendant is a foreign corporation, having no managing or business agent, cashier, or secretary, within the state. In such cases the court or judge may grant an order that the service be made by publication of summons: Cal. Code C. P., sec. 412.

22. The existence of either one of these conditions is not alone sufficient. In addition thereto, it must also appear by affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action: Cal. Code C. P., sec. 412. It is settled that the statute providing the mode for acquiring jurisdiction of a defendant by the publication of summons, being in derogation of the common law, must be strictly followed in order to give the court jurisdiction over the person of the defendant: *Ricketson v. Richardson*, 26 Cal. 149; *Jordan v. Giblin*, 12 Cal. 100; *Forbes v. Hyde*, 31 Id. 342; *People v. Huber*, 20 Id. 81; *Cohn v. Kember*, 47 Id. 145. There is no provision that a judge may order a summons to issue. His only power is to order a summons, which has already issued, to be served in a particular manner: *People v. Huber*, *supra*. No presumption in favor of jurisdiction acquired by publication of summons will be indulged: *McMinn v. Whelan*, 27 Cal. 309; *Hallett v. Richters*, 13 How. Pr. 43; *Kendall v. Washburn*, 14 Id. 380; *Titus v. Relyea*, 16 Id. 371; *Cook v. Farren*, 34 Barb. 95; 12 Abb. Pr. 359; 11 Id. 40; *Wortman v. Wortman*, 17 Abb. Pr. 66; *Fiske v. Anderson*, 33 Barb.

71; 12 Abb. Pr. 8. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months. If the place of residence of a non-resident or absent defendant is known, the order must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state, is equivalent to publication and deposit in the post-office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication: Cal. Code C. P., sec. 413. This procedure is constitutional: *Eitel v. Foote*, 39 Cal. 441; *McCauley v. Fulton*, 44 Id. 359. As to fictitious names, where real name is unknown, see *ante*, par. 6.

WHAT IS SUFFICIENT PUBLICATION.

23. A publication of summons weekly, against a non-resident defendant, commencing on the tenth day of January, and ending on the ninth day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the tenth of April: *Savings and Loan Society v. Thompson*, 32 Cal. 347. If the last day of the publication is in the same week in which the three months expire, the publication is sufficient, although this day is less than three months from the first day of publication: *Id.* If some of the publications of a summons, including the last, are made on Sunday, in the regular issue of the paper, it does not vitiate the service: *Id.* The month contemplated by the statute is a calendar and not a lunar month: *Id.*

24. When the time is important, courts will inquire into a day or fractional portion of a day: *People v. Beatty*, 14 Cal. 566. A judgment rendered against a party, who is absent from the state upon publication of the summons thirty days only, is void: *Jordan v. Giblin*, 12 Cal. 100. A publication for seventy days is held to be a publication for ten weeks: *People v. Gray*, 10 Abb. Pr. 468. A publica-

tion for thirty-nine days held a publication for six weeks: *Olcott v. Robinson*, 21 N. Y. 150. The month contemplated by the statute is a calendar month, and not a lunar month: *Sprague v. Norway*, 31 Cal. 173. Section 1054, Cal. Code C. P., has no application to proceedings under this section: *S. & L. Soc. v. Thompson*, 32 Cal. 350.

CHANGE IN SUMMONS INADMISSIBLE.

25. The summons must be published as it was when the order of publication was made: *McMinn v. Whelan*, 27 Cal. 300. For example, when an order was made for the service of summons by publication, and a summons was issued, and a supplemental complaint was afterwards filed, and a summons issued thereon, it was held that the original action became merged in the action as supplemented, and the court did not acquire jurisdiction of the persons of absent defendants by publication of the original summons, but it was essential to serve by publication the summons issued on the supplemental complaint: *Forbes v. Hyde*, 31 Id. 342; *McMinn v. Whelan*, 27 Cal. 309. Discrepancies of a purely literal character between the summons as issued, and as published, will be disregarded; where in sense and meaning they are identical: *Sharp v. Daugney*, 33 Cal. 505.

TIME TO APPEAR AFTER PUBLICATION.

26. The Cal. Code C. P., sec. 413, further provides, in relation to service on non-residents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication:" *Held*, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer: *Grewell v. Henderson*, 5 Cal. 465.

DEPOSIT IN POST-OFFICE.

27. In case of publication where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence: Cal. Code C. P., sec. 413; *Back v. Crussell*, 2 Abb. Pr. 386; *Van Wyck v. Hardy*, 11

Id. 474; 20 How. Pr. 222. Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the post-office, directed to the infant, the same as to other defendants: *Gray v. Palmer*, 9 Cal. 616. The failure to deposit such, when directed to a minor, is not cured by the appearance of the mother in her own behalf: Id.

28. When an order for service by publication is obtained, if personal service out of the state is effected, it is unnecessary to proceed to make publication, and to deposit a summons in the post-office: *Abrahams v. Mitchell*, 8 Abb. Pr. 123. In New York it is held that such personal service out of the state is only equivalent to mailing, and can have no greater effect: *Fiske v. Anderson*, 12 Id. 8. A delay of four days in mailing, caused by waiting to have the papers printed, did not render the service irregular: *Van Wyck v. Hardy*, 11 Id. 473. Fifteen days' delay would make it irregular: *Back v. Crussell*, 2 Id. 386.

SERVICE BY PUBLICATION WHEN CONCLUSIVE.

29. The provisions of the statute, prescribing the mode of acquiring jurisdiction of the person of the defendant, by publication of the summons, must be strictly pursued: *Jordan v. Giblin*, 12 Cal. 100; *Cohn v. Kember*, 47 Id. 145; *Kendall v. Washburne*, 14 How. Pr. R. 380. If the code intended a judgment rendered against a defendant, served by publication, to be final under all circumstances, the constitutionality of such service might admit of very grave doubt. But the legislature did not so intend: *Ware v. Robinson*, 9 Cal. 111. The affidavit is only *prima facie* evidence of the facts, and if untrue the defendant can at any time have the judgment set aside: Id. If the defendant in fact conceals himself to avoid the service of process, he will not be heard to complain that he was not personally served: Id.; see, also, *Swain v. Chase*, 12 Id. 285; *Ricketson v. Richardson*, 26 Id. 154; *Braly v. Seaman*, 30 Id. 617. If jurisdiction of the person of a defendant was to be acquired by publication of the summons in lieu of personal service, the statutory mode must be strictly pursued; and if it appear that the court never had jurisdiction of the person of the defendant by reason of non-compliance with

the provisions of the statute, the judgment entered in the case against such defendant will be pronounced a nullity, whether it come directly or collaterally in question: *McMinn v. Whelan*, 27 Cal. 312; see, also, *Forbes v. Hyde*, 31 Id. 347-355; *McCauley v. Fulton*, 44 Id. 359; *Martin v. Parsons*, 50 Id. 502. But a judgment rendered against a non-resident of the state, who has not been personally served within the state, nor submitted himself to the jurisdiction of the court, can only be enforced within the state in which the judgment is rendered, and no personal liability will result therefrom, which will be recognized beyond the state in which the action originated: See *Wilson v. Graham*, 4 Wash C. C. 53; *Folger v. Columbia Ins. Co.*, 99 Mass. 267; *Holmes v. Holmes*, 4 Lansing (N. Y.), 388; *Weil v. Lowenthal*, 10 Iowa, 578; *Harris v. Hardeman*, 14 How. U. S. 340; *Reber v. Wright*, 68 Pa. St. 471; Freeman on Judgments, sec. 564.

CHAPTER II.

FORMS OF SUMMONS AND AFFIDAVITS OF SERVICE.

No. 798.

Summons in Action on Contract for Payment of Money only.

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff,
against
C. D., Defendant.

Action brought in the District Court of the
.....Judicial District of the State of
California, in and for the City and County of
San Francisco, and the complaint filed in said
City and County of San Francisco, in the
office of the clerk of said District Court.

The People of the State of California send greeting:

To....., defendant: You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the..... Judicial District of the State of California, in and for the City of.....and County of....., and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise, within forty days; or judgment by default will

be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of..... dollars, gold coin of the United States, due from defendant to plaintiff upon [a certain promissory note made by the defendant on the.... .day of....., 187..., to said plaintiff, for.....dollars, payable..... months after date], particularly described in the complaint; also, for interest thereon, at the rate of.....per cent. per month.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for said sum ofdollars, in gold coin of the United States, interest and costs.

Given under my hand and the seal of the District Court of the.....Judicial District of the State of California, in and for the City and County of....., this.....day of , 187...

A. B., Clerk.

By C. D., Deputy Clerk.

1. **Notice.**—If the recovery of money or damages be demanded, the amount thereof must be stated in the prayer of the complaint: Cal. Code C. P., sec. 426, subd. 3. The relief granted to a plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint: Id. sec. 580. A notice in summons, that plaintiff will take judgment for the given sum, “with interest” thereon from a specified day, is sufficient: *People v. Woodlief*, 2 Cal. 241; *King v. Blood*, 41 Id. 317; *Swift v. De Witt*, 3 How. Pr. 280. In an action for work and labor done, and for the enforcement of a mechanic’s lien, it is sufficient if the notice in the summons says “that plaintiff will take judgment for a certain sum specified therein.” So held in the supreme court of Oregon: *Willamette Falls and Mi. Co. v. Riley*, 1 Oregon, 183. As to when the summons must specify the amount, see *Commissioners of Albany v. Classon*, 17 How. Pr. 193; *Cemetery Board v. Teller*, 8 Id. 504; *Diblee v. Mason*, 1 Code R. 37. The judgment by default is fatally defective if the summons does not apprise the defendant that, upon his failure to appear and answer, the plaintiff will take judgment against him for a certain sum: *State v. Woodlief*, 2 Cal. 241. Where no other notice was given than that judgment would be taken for a specified sum, the plaintiff can only take an ordinary judgment upon default for the money demanded: *Porter v. Hermann*, 8 Id. 625.

*No. 799.**Summons in Justices' Court.*

[STATE AND COUNTY.]

[COURT.]

A. B., Plaintiff, <i>against</i> C. D., Defendant.
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The people of the State of California send greeting to
....., Defendant. You are hereby required to appear
in an action brought against you by the above named plaintiff,
in the Justice's Court of Township, County
of State of California, and to answer before
the justice at his office in the said township, the complaint
filed therein, within five days (exclusive of the
day of service), after the service on you of this summons—if
served within the township in which this action is brought;
or, if served out of said township, but in said county, within
ten days; or, within twenty days, if served elsewhere.

The said action is brought to recover [..... dollars principal,
and interest at the rate of ... per cent. per month from
the day of, 187.. upon a promissory note made
by the defendant to the order of A. B., dated the day
of, 187.., and payable months after date,
and which note was indorsed and delivered to the plaintiff
by said A. B.] And you are hereby notified that if you fail
to so appear and answer said complaint, as above required,
said plaintiff will take judgment against you for the sum of
.....dollars, together with costs..... Make legal service
and due return hereof.

Given under my hand this day of 187..

.....,

Justice of the Peace of said Township.

2. Action.—An action in a justice's court is commenced by filing a complaint: Cal. Code C. P. sec. 839.

3. Attorney.—Parties may appear and act in person, or by attorney, and any person, except the constable by whom the summons or jury process was served, may act as attorney: Cal. Code C. P. sec. 842.

4. Appearance.—At any time after the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons: Cal. Code C. P. sec. 841. As to appearance of infants, see Id. sec. 843.

5. Summons.—For what the summons must contain, and to whom directed, see Cal. Code C. P. sec. 844. The time specified in the summons for the appearance of the defendant, must be as follows: 1. If an order of

arrest is indorsed on the summons, forthwith; 2. In all other cases the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the township in which the action is brought; within ten days, if served out of the township, but in the county in which the action is brought; and within twenty days, if served elsewhere: Id. sec. 845. If brought within the city and county of San Francisco, within three days after service: Stat. 1871-2, p. 94. As to the practice in justices' courts in the city and county of San Francisco, see Harston's Practice, p. 56, notes to sec. 119.

6. Summons, Alias.—If the summons is returned without being served upon one or all of the defendants, an *alias* summons may issue in the same form, except that the time for the appearance of the defendant may be fixed at a period not to exceed ninety days from its date: Cal. Code C. P., sec. 846. The justice may, within a year from the date of the filing of the complaint, issue as many *alias* summons as may be demanded by the plaintiff: Id., sec. 847. As to when the summons may be served out of the county in which the action is brought, see Id. sec. 848.

7. Service of Summons.—The summons may be served by a sheriff or constable of any of the counties of this state, but when it is to be served out of the county, the summons shall have attached to it a certificate of the county clerk that the person issuing the same was an acting justice of the peace at the date of the summons. A justice's summons may also be served by any male resident over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned as provided by title v., part ii. (secs. 405-416), Cal. Code C. P. Summons may also be served by publication under the same circumstances and in the same manner as a district court summons: Cal. Code C. P., sec. 849.

No. 800.

Summons in Action to Foreclose Mortgage.

[TITLE AS IN No. 798.]

The People of the State of California send greeting to
, defendant. You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the Judicial District of the State of California, in and for the, County of, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise, within forty days—or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a decree of this Court for the foreclosure of . . . certain mortgage described in the said complaint, and executed by the said

on the day of, 187., to secure the payment of a certain, that the premises conveyed by said mortgage may be sold, and the proceeds applied to the payment of said; and in case such proceeds are not sufficient to pay the same, then to obtain an execution against said for the balance remaining due, and also that the said defendant, and all persons claiming by, through or under may be barred and foreclosed of all right, title, claim, lien, equity of redemption and interest in and to said mortgaged premises, and for other and further relief, as will more fully appear by reference to the complaint on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the said complaint.

[Attestation, date and signature as in No. 798.]

8. Actions for Relief.—A summons for relief is the proper form in an action in which a part of the relief sought is unliquidated damages for the breach of an agreement to carry on business: *Tuttle v. Smith*, 6 Abb. Pr. 329; S. C., 14 How. Pr. 395; but see *Hartman v. Williams*, 4 Cal. 225; *Dimick v. Campbell*, 31 Id. 239; *Emeric v. Tams*, 6 Id. 156. Or for breach of agreement to convey real property: *Johnson v. Paul*, 6 Abb. Pr. 335; S. C., 14 How. Pr. 454. Or in any action on undertaking of bail: *Kelsey v. Corert*, 6 Abb. Pr. 336; S. C., 15 How. Pr. 92; *Levy v. Nicholas*, 15 Abb. Pr. 63. Or on a constable's bond: *Mayor of N. Y. v. Lyons*, 1 Daly, 296; 24 How. Pr. 280. So, in an action for breach of warranty: *Dunn v. Bloomingdale*, 6 Abb. Pr. 340; S. C., 14 How. Pr. 474. So, in actions for conversion: *Voorhies v. Schofield*, 7 How. Pr. 51; *Ridder v. Whitlock*, 12 How. Pr. 208. So, in actions for an account of moneys collected: *West v. Brewster*, 1 Duer, 647; see Cal. Code C. P., sec. 407.

9. Actions for Relief.—Where an allegation of a mistake on a former accounting, and a demand for a new accounting, is contained in the complaint, the summons is properly for relief: *McDougall v. Cooper*, 31 N. Y. 498. Against a carrier, for loss of goods: *Hewitt v. Howell*, 8 How. Pr. 346; *Campbell v. Perkins*, 4 Seld. 438. Or for breach of contract to transport goods: *Luling v. Stanton*, 2 Hilt. 538. For unliquidated damages generally: *Croden v. Drew*, 3 Duer, 654; *People v. Bennett*, 6 Abb. Pr. 343; *Salters v. Ralph*, 15 Abb. Pr. 273; *Cobb v. Dunkin*, 19 How. Pr. 164; *Luling v. Stanton*, 8 Abb. Pr. 378. For liquidated and unliquidated damages: *Norton v. Cary*, 14 Abb. Pr. 364; 23 How. Pr. 469; *Hartshorn v. Newman*, 15 Abb. Pr. 63; *Henson v. Decker*, 29 How. Pr. 385.

10. Actions for Relief.—In actions for fraud the summons must apprise the defendant that on failure to answer, judgment will be taken against him for the fraud. A mere notice that a money-judgment will be taken against him will not support a judgment for fraud: *Porter v. Hermann*, 8 Cal. 619;

Hartshorn v. Newman, 15 Abb. Pr. 63; *Travis v. Tobias*, 7 How. Pr. 90; *Field v. Morse*, 7 How. Pr. 12. Or to open an account on the ground of mistake: *McDougall v. Cooper*, 31 N. Y. 498. So, for damages for death by wrongful act: *Doedt v. Wiswell*, 15 How. Pr. 128. So, on breach of contract to convey: *Johnson v. Paul*, 14 How. Pr. 454. For breach of contract to marry: *Davis v. Bates*, 6 Abb. Pr. 15; *McDonald v. Walsh*, 5 Id. 68; *McNeff v. Short*, 14 How. Pr. 463. The cases of *Williams v. Miller*, 4 How. Pr. 94; 2 Code Rep. 55; and *Leopold v. Poppenheimer*, 1 Code Rep. 39, overruled.

11. Alias Summons.—The clerk of the district court is authorized, on demand of the plaintiff, to issue an *alias* summons after the expiration of the year during which the original must be issued. If the plaintiff is guilty of laches, by failing to serve either the original or the *alias* the defendant may move to quash: *Dunker v. Lutz*, 48 Cal. 466.

12. Notice.—See Cal. Code C. P. sec. 407; N. Y. Code, secs. 418, 419, 420.

13. Redelivery and Service after Return.—After a summons has been served on some of the defendants, and returned, the court may order it delivered to the plaintiff for further service on other defendants in the same or another county: *Hancock v. Pruess*, 40 Cal. 572. A redelivery of the summons without an order of the court is an irregularity of which the opposite party may avail himself by direct attack; but such irregularity will not render the service void: *Id.*

No. 801.

Return of Sheriff on Summons—General Form.

[STATE AND COUNTY.]

[COURT.]

Office of the Sheriff, City and }
County of }

I hereby certify that I received the within summons on the day of, 187., and personally served the same on the day of 187., by delivering to [names], said defendants personally, in the city and county of, a copy of said summons attached to a true copy of the complaint in the said action therein named.

G. H., Sheriff.

By J. K., Deputy Sheriff.

Dated at, this day of, 187..

14. Copy of Summons.—In a collateral attack on a judgment, the return of the sheriff that he served a copy of the summons, will be held equivalent to a return that he served a copy certified by the clerk: *Brown v. Lawson*, 51 Cal. 615.

15. Defective Service.—Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was, at the time of such purchase, cognizant of the fact of such defective service, and, also, that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside: *McMillan v. Reynolds*, 11 Cal. 372.

16. Deputy.—The general rule of the common law is that officers who exercise judicial functions cannot act by deputy, but those who exercise merely ministerial functions may, without express authority to that effect: *Jobson v. Fennell*, 35 Cal. 711. In the absence of statutory provisions as to the appointment of deputies by constables, the common law rule applies, and constables may act by deputy in the exercise of their ministerial functions: *Id.* Courts cannot know an under officer, and the act and return on a summons of a deputy-sheriff is a nullity, unless done in the name and by the authority of his principal: *Joyce v. Joyce*, 5 Cal. 449. A summons was served by the deputy-sheriff, and returned, with the following signature to the return: "Elijah F. Cole, D. S." Judgment was rendered by default: *Held*, that the judgment was null and void; the return should have been made in the name of the sheriff by the deputy: *Rowley v. Howard*, 23 Cal. 401.

17. Description of Land.—A description in a sheriff's return of city lots, by numbers referring to the official map, is sufficient: *Welch v. Sullivan*, 8 Cal. 186.

18. On a Minor.—If a father sues his infant son, residing with him, and the statute requires the summons to be served personally on the infant and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service: *Brown v. Lawson*, 51 Cal. 615.

19. On Corporations.—Where the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company," it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president or head of the corporation, or secretary, cashier, or managing agent thereof: *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343. A sheriff's return that he served the summons on the president and secretary of the company is *prima facie* evidence that the persons named in the return were such officers: *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

20. On Partners.—The return of a sheriff that he served the summons on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate: *Willson v. Spring Hill Quartz Mining Co.*, 10 Cal. 445. Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co., judgment by default could not be sustained: *Adams v. Town*, 3 Cal. 247.

21. Presumptions.—Courts should presume that the sheriff served all processes within his jurisdiction, where no place of service is stated: *Crane v. Brannan*, 3 Cal. 192. Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else: *Curtis v. Herrick*, 14 Cal. 117. A sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion: *Egery v. Buchanan*, 5 Cal. 56.

22. Service.—Personal service of writs and process can only be made by delivering a copy to the party upon whom the service is required: *Edmondson v. Mason*, 16 Cal. 388. In the absence of the statute it would be necessary to show the original with the seal of the court, and also to deliver a copy: *Id.* A summons cannot be served on defendant's attorney in fact: *Drake v.*

Durenick, 45 Id. 455. In making service of a summons, and in the return of such service, the provisions of the statute must be shown to have been substantially followed by the officer; otherwise the proceedings cannot be supported upon a direct appeal: *People v. Bernal*, 43 Id. 385.

23. Time and Place.—In case of service, otherwise than by publication, the certificate or affidavit shall state the time and place of the service: Cal. Code C. P., sec. 415; N. Y. Code, ed. 1877, sec. 434. The only object of the designation of the place where process is served is to determine the period within which the answer must be filed, or when default may be taken: *Alderson v. Bell*, 9 Cal. 315. Where the evidence of place of service is insufficient, advantage of it should be taken, either by appeal or on motion to vacate the judgment: *Pico v. Suñol*, 6 Cal. 294.

24. Where one Defendant was not Found.—I further certify that I have made diligent search for the defendant A. B. named in said summons, but have been unable to find him within my said county.

No. 802.

Affidavit of Service of Summons upon Several Defendants.

[TITLE.]

State of California, }
City and County of } ss.

A. B., being duly sworn, deposes and says:

I received the annexed summons in the above-entitled cause on the day of, 187., and on the day of, 187., personally served the same, by delivering to C. D., one of said defendants, personally, in the City and County of San Francisco, a copy of said summons, attached to a copy of the complaint in the above-entitled cause, and by leaving the same with him, and also, on the day of, 187., by delivering to E. F., one of said defendants, personally, in the City and County aforesaid, a copy of said summons, and also, personally, on the day of, 187., by delivering to G. H., one of said defendants, in the City and County of San Francisco, a copy of said summons; and I further depose that each of said defendants was, on said mentioned days, resident of the said City and County of San Francisco; and I further depose that I am, and was at all the times hereinbefore named, a citizen of the United States, over eighteen years of age, and not a party to the above-entitled action.

Subscribed and sworn to, etc.

*No. 803.**Affidavit of Service of Summons—Another Form.*

[TITLE.]

State of California,
County of..... } ss.

....., being duly sworn, deposes and says, that he is, and at the several times hereinafter mentioned was, a citizen of the United States, above the age of eighteen years, and not a party to the above-entitled action; that he received the annexed summons in said action on the....day of....., A. D. 187..., and personally served the same upon....., the above-named defendant, on the....day of....., A. D. 187..., by delivering to..... the said defendant, personally, in the.....county of....., a copy of said summons, attached to a copy of the complaint in said action.

[JURAT.]

[SIGNATURE.]

25. Effect of Defective Affidavit.—Failure to state in the affidavit that the facts constituting competency existed at the day of service, it appearing that they existed at the time of making the affidavit, does not invalidate the judgment when attacked collaterally—it is a mere irregularity: *Peck v. Strauss*, 33 Cal. 678.

26. Mode, Time and Place.—The proof of personal service, if made by an officer, is by his affidavit or certificate, setting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit setting forth said facts, and in addition the facts constituting his said qualifications. Proof of constructive service, or service by publication, is by the affidavit of the printer, his foreman or principal clerk, setting forth the fact where and how long the publication of summons has been made, and where a deposit in the post-office had been ordered, then an affidavit showing such deposit: *Hahn v. Kelly*, 34 Cal. 391. The affidavit must show affirmatively compliance with all the requirements of law: *McMillan v. Reynolds*, 11 Cal. 378.

27. Residence of Defendant.—If the affidavit of service of summons states the county in which the service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made: *Calderwood v. Brooks*, 28 Cal. 151.

28. Sufficient Affidavit.—And if the affidavit state the facts constituting affiant a competent witness, it is sufficient without stating that he is competent: *Dimick v. Campbell*, 31 Cal. 238.

*No. 804.**Affidavit for Publication of Summons.*

[TITLE.]

[VENUE.]

A. B., of....., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action. The

FORMS OF SUMMONS AND AFFIDAVITS OF SERVICE.

complaint in said action was duly filed with the Clerk of this Court on the....day of....., 187..., and summons thereupon issued; and the said action is brought for the purpose of [state the purpose of the action].

II. The defendant C. D. last resided at the City and County of....., but he has departed from this State, and now resides at....., in the County of....., State of Nevada. [Or, That the last known place of residence of said defendant, C. D., was at....., within this State, but that he removed thence on or about the.... day of....., 187..., and his residence at this time cannot with due diligence be ascertained. I have diligently made such inquiry of.....and, his former neighbors and acquaintances, and of....., his wife, and of his father and brother, who reside at the said City and County of....., and I am informed by them that they are ignorant of defendant's residence, but that he is not, as they believe, within this State.]

III. That a summons was duly issued out of this Court to the Sheriff of the City and County of....., with directions to said Sheriff to serve the same upon said defendant, and the said Sheriff has returned the same to the clerk of this Court, with his return thereon indorsed, to the effect that the said defendant could not be found in his county [or state particulars of the return].

IV. I have fully and fairly stated the facts of the case to E. F., of No.....Street, in the City of San Francisco, my counsel, and I am by him informed, and I verily believe, that I have a good cause of action in this suit against the said defendant, as will fully appear by my verified complaint filed herein, to which reference is hereby made, and the said defendant, C. D., is a necessary and proper party defendant thereto, as I am advised by my said counsel after such statement made, as aforesaid, and as I verily believe.

V. Personal service of said summons cannot be made on the said defendant, and I therefore demand an order that service of the same may be made by publication.

A. B.

29. Affidavit Essential.—Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit, either that the defendant resides out of the state, or has departed from the state, or

cannot, after due diligence, be found within the state, or that he conceals himself to avoid the service of summons, and in addition thereto it must also appear by affidavit that a cause of action exists against the defendant, or that he is a necessary or proper party: *Braly v. Seaman*, 30 Cal. 610; see Cal. Code C. P., sec. 412.

30. Affidavit Must Show.—The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and, if known, the residence must be stated: *Ricketson v. Richardson*, 26 Cal. 149; *Braly v. Seaman*, 30 Id. 610; *Hyatt v. Wagenright*, 18 How. Pr. 248; *Cook v. Farren*, 34 Barb. 95; 12 Abb. Pr. 359; 11 Id. 40. Nor is it sufficient merely to repeat the language or substance of the statute: *Ricketson v. Richardson*, 26 Cal. 149. An affidavit in such case must state facts which show that due diligence to find the defendant has been used, and it must also appear therefrom that the diligence has not been rewarded with a discovery: *Braly v. Seaman*, 30 Cal. 610; *Forbes v. Hyde*, 31 Cal. 342.

31. Evidence Must be Conclusive.—Where the affidavit for publication of summons presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal; but it is not void: *Forbes v. Hyde*, 31 Cal. 342. If there is a total want of evidence upon which to base the order, the judgment is void: Id. In the former case the judgment cannot be attacked collaterally, but only on appeal: Id.; see, also, *McCauley v. Fulton*, 44 Id. 359; *Martin v. Parsons*, 50 Id. 502.

32. Facts Set Out.—Facts should be set out in an affidavit for an order to publish summons, and not a general expression of opinion or belief that an ultimate jurisdictional fact exists, without the probative facts upon which such opinion or belief is founded: *Forbes v. Hyde*, 31 Cal. 342; *Collins v. Ryan*, 32 Barb. 647; *Roche v. Ward*, 7 How. Pr. 416; *Tousley v. McDonald*, 32 Barb. 604.

33. Insufficient Affidavit.—An affidavit to obtain an order for publication of summons, which states that the deponent “has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes,” does not state any fact tending to show a cause of action, and an order and publication based on it are void: *Forbes v. Hyde*, 31 Cal. 342; *Sharp v. Daugney*, 33 Id. 515; *Hahn v. Kelly*, 34 Id. 391; An affidavit for publication on the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of F., who is an intimate friend of defendant, as to his whereabouts; that F. was unable to inform him; and that plaintiff did not know where defendant could be found within the state, was held insufficient: *Swain v. Chase*, 12 Id. 283. It is not sufficient to state generally, in such affidavit, that, after due diligence, the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated: *Ricketson v. Richardson*, 26 Cal. 152; *Warren v. Tiffany*, 9 Abb. Pr. 66; 17 How. Pr. 106. It must be proved that the person to be served cannot, after due diligence, be found in the state: *Hurlburt v. Hope*

Mut. Ins. Co., 4 How Pr. 278; *Wortman v. Watman*, 17 Abb. Pr. 66; *Irving Savings Institute v. Hardman*, 17 Abb. Pr. 67.

34. On Infant.—The requirements of the statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this state, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication: *Gray v. Palmer*, 9 Cal. 616.

35. Presumption.—The affidavit and orders referred to form no part of the judgment-roll; and it is a matter of no consequence whether the jurisdiction of the court appears affirmatively upon the judgment-roll or not, for if it does not, it will be conclusively presumed when the judgment is collaterally attacked: *Hahn v. Kelly*, 34 Cal. 391.

36. Suffolient.—Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication: *Anderson v. Parker*, 6 Cal. 201; *Towsley v. McDonald*, 32 Barb. 604. As to insufficiency of affidavit on these points, see *Swain v. Chase*, 12 Cal. 283; *Godkin v. Redgate*, 1 Cr. & J. 401.

No. 805.

Order for Publication of Summons.

[TITLE.]

Upon reading and filing the affidavit of A. B., and it satisfactorily appearing therefrom to me, the Judge of the District Court of the Judicial District of the State of, in and for the County of, that the defendant C. D. resides out of this State, and cannot, after due diligence, be found therein [or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, as the case may be], and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein, and against the said defendant, and that the said defendant C. D. is a necessary and proper party defendant thereto; and it further appearing that a summons has been duly issued out of said Court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavit made to appear: On motion of E. F., Esq., attorney for the plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the, a newspaper published at, hereby designated as the newspaper most likely to give notice to said defendant; that

such publication be made at least once a week for two months.

And it further in like manner satisfactorily appearing to me that the residence of said defendant is known to be at the City of....., in the County of....., in the State of....., it is ordered that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the post-office, post paid, directed to the said defendant, at his said place of residence.

J. D., Judge of the District Court of
the.....Judicial District for
the County of....., State
of.....

[DATE.]

37. Order must State.—The order must state the facts proved by the affidavit upon which it is based: *Ricketson v. Richardson*, 26 Cal. 149. It is not sufficient for the order to state generally that the defendant resides out of the state, or cannot after due diligence be found within the state, or that a cause of action exists against the defendant: *Ricketson v. Richardson*, 26 Cal. 152.

38. Order Insufficient.—Where, after complaint filed, and before any summons was issued, an order was obtained from the judge that “summons do issue,” and that it be published, and without any further order summons was subsequently issued and published: *Held*, that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void: *People v. Huber*, 20 Cal. 81. The question of the sufficiency of an affidavit and order for publication of summons may be raised by motion made in the suit, or by an appeal supported by a statement: *Sharp v. Daugney*, 33 Cal. 505. An order to publish a summons made in advance of the issuance of the summons is a nullity: *People v. Huber*, 20 Cal. 81.

39. Power of Judge.—The judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner: *McMinn v. Whelan*, 27 Cal. 304; *Forbes v. Hyde*, 31 Id. 342. The court acts judicially in granting the order, and can know nothing about the facts upon which it is granted, except from the affidavit: *Ricketson v. Richardson*, 26 Cal. 149.

40. What Order must Direct.—An order for the publication of a summons, which presupposes that the debtor is a resident of the state, but has departed therefrom, or keeps himself concealed therein, must direct a copy of the summons and complaint to be deposited in the post-office, directed to the defendant at his place of residence, though it appear from the affidavit that he has departed therefrom: *Towsley v. McDonald*, 32 Barb. 604.

*No. 806.**Affidavit of Publication.*

[TITLE.]

[VENUE.]

A. B., of said.....County, being duly sworn, deposes and says as follows:

I. I am a citizen of the United States, over eighteen years of age, and am not a party to the above-entitled action.

II. I am the principal clerk and book-keeper in the office of the Daily, a newspaper printed and published in the City and County of [or printer, foreman, or principal clerk].

III. The summons of which the annexed is a printed copy, was published in said newspaper at least once each week for months, commencing on the day of, 187.., and ending on the day of, 187..

[JURAT.]

[SIGNATURE.]

NOTE.—It will be observed that many of the affidavits herein are made in the first person. This mode is the universal English practice, and is recommended by the code commissioners of the state of New York, and I here take the liberty of recommending it to the profession, as it certainly appeals more directly to a man's conscience than if made in the third person.

41. By Whom Made.—Where the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or chief clerk, it was held sufficient, as being within the spirit of the statute: *Sharp v. Daugney*, 33 Cal. 505. When service is had by the publication, proof thereof can only be made by affidavit of the printer, his foreman or clerk; and the affidavit should state that the person taking the same holds one of these positions: *Steinbach v. Leese*, 27 Cal. 295. And there being but one clerk in the office of the newspaper, and the affidavit describing him as principal clerk, the affidavit was held sufficient: *Gray v. Palmer*, 9 Cal. 616.

42. Presumption.—If the affidavit does not show facts sufficient to give jurisdiction, but the judgment in the recitals supplies those facts, or recites that service had been had upon the defendant, the judgment will control. It will be presumed that other evidence than that contained in the judgment roll was made. The recital imports absolute verity: *Hahn v. Kelly*, 34 Cal. 391.

43. Sufficiency of.—An affidavit commencing, "A. B., principal clerk, etc., being sworn, deposes," etc., was held insufficient in *Steinbach v. Leese*, 27 Cal. 295. He should swear that he is principal clerk in direct and positive terms.

*No. 807.**Affidavit of Service by Mail of Summons and Copy of Complaint.*

[TITLE.]

[VENUE.]

A. B., of, being duly sworn, deposes and says as follows:

I. I am, and at the several times hereinafter mentioned was, a citizen of the United States, over eighteen years of age, and am not a party to the above entitled action.

II. On the day of, 187., the complaint in the said action was filed, and afterwards to wit, on the day of, 187., an order was made by the Court for the publication of the summons in the said action, and also a further order that a copy of said complaint and a copy of the said summons should be forthwith deposited in the post-office, and directed to the defendant in said action, at his place of residence, to wit: at the City of, in the County of, State of; that afterwards, to wit: on the day of, 187., and in pursuance of said order of the Court in the premises heretofore made, I deposited in the post-office at the City of a copy of the said summons, attached to a copy of the said complaint, directed to C. D., the said defendant, at the City of, in the County of, State of, the place of his residence as aforesaid, and prepaid the postage thereon.

[JURAT.]

[SIGNATURE.]

44. Statement in Affidavit.—The affidavit of deposit of summons in post-office need not state that the deposit was made by a white male citizen, or that the affiant is such citizen. It is sufficient if the deposit and affidavit are made by a human being: *Sharp v. Daugney*, 33 Cal. 505. Nor is it necessary to state that there is a communication by mail between the place of deposit and the place to which the packet was addressed, nor that the post-office was a United States post-office: *Id.*

*No. 808.**Admission of Service.*

[TITLE.]

I admit [due and] personal service of the within upon me, made this day of, 187., at

[SIGNATURE.]

45. Date.—Where defendant's attorneys accepted service of summons, but attached no date thereto, the date of the return by the sheriff was held

to be the true date of the service. When the place where the writ is served is not stated, the court should assume that it was served within the jurisdiction of the officer to whom it was directed: *Crane v. Brannan*, 3 Cal. 192.

46. Judicial Notice.—Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions to be available in the action should be accompanied with some evidence of the genuineness of the signatures of the parties; in the absence of such evidence, the court cannot notice them: *Alderson v. Bell*, 9 Cal. 315.

47. Must be in Writing.—An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient: *Montgomery v. Tutt*, 11 Cal. 307.

CHAPTER III.

APPEARANCE.

1. It is provided by statute that after the filing of the complaint a defendant in the action may appear, answer or demur, whether the summons has been issued or not; and such appearance, answer or demurrer shall be deemed a waiver of summons: Cal. Code C. P., sec. 406; Code of Oregon, sec. 59; Wash. T. sec. 40; Arizona, sec. 22; Idaho, sec. 22; N.Y. Code, sec. 127; Swan's Ohio Pl. 22. A voluntary appearance by a defendant gives jurisdiction without issuance of summons: Cal. Code C. P., sec. 416; *Hayes v. Shattuck*, 21 Cal. 51; *Carrington v. Bents*, 1 McLean, 174; *Shields v. Thomas*, 18 How. U. S. 253; as the only object of the summons is to bring a party into court, and if that object is obtained without issuance or service, there can be no injury to the defendant: *Smith v. Curtis*, 7 Cal. 587. So, a guardian may waive process, and enter his appearance for his ward: *Springer v. Litherberry*, 4 McLean, 442.

2. Appearance covers all defects and irregularities in process, and the want of service: 2 Stra. 1,072; 4 Cranch, 180; 3 Cranch, 498; *McCoy v. Lemons*, Hempst. 216; see *Pollard v. Dwight*, 4 Cranch, 421; The "Merino," 9 Wheat. 391; *Flanders v. Ætna Ins. Co.*, 3 Mass. 158; *Segee v. Thomas*, 3 Blatchf. 11; *Harrison v. Rowan*, 1 Pet. C. Ct. 489. See, as to appearance in case of foreign attachment: *Toland v. Sprague*, 12 Pet. 300. See, in case of an absent

defendant: *Shields v. Thomas*, 18 How. Pr. 253. A general appearance not only waives defects in a writ or summons, but gives jurisdiction over the person in cases where the writ was void: *State v. McCullough*, 3 Nev. 202; *Farrar v. United States*, 3 Pet. 459; *Pollard v. Dwight*, 4 Cranch, 421.

3. But appearance does not cure a substantial defect in the writ of error (such as naming a return day for the writ), or an omission to file a transcript of the record at the term next succeeding the issuing of the writ or the taking of the appeal: *Carroll v. Dorsey*, 20 How. U. S. 204. Nor does it preclude a party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for want of a citation, or for mere irregularity in its service: *United States v. Yates*, 6 How. U. S. 605. A notice given by an attorney to plaintiff's attorney, that the defendant will move before a court commissioner that an attachment issued in the case be dissolved, does not constitute an appearance in the action: *Glidden v. Packard*, 28 Cal. 649. So, when a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect: *Deidesheimer v. Brown*, 8 Cal. 339; *Lyman v. Milton*, 44 Id. 631; *Lander v. Fleming*, 47 Id. 614. An answer does not waive the benefit of an exception by defendant to an order denying a motion by him to set aside the service of a summons: *Kent v. West*, 50 Id. 185.

4. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him: Cal. Code C. P. sec. 1014. A notice signed by attorneys and filed with the clerk after a complaint has been filed, stating that "we have been retained by, and hereby appear for, the above-named defendant in the above-entitled cause," is a sufficient appearance of the defendant, and is a waiver of summons: *Dyer v. North*, 44 Cal. 157. As to authority of attorney to bind his client, see Cal. Code C. P. sec. 283. The filing of a general demurrer is an appearance, and cures any defect in service of process: *Williams v. Miller*, Sup. Ct. Wash. Terr. 1864, p. 106. A defendant cannot appear in an action, so as to give the court jurisdiction of his person,

except by answering or demurring, or giving plaintiff written notice that he appears: *Steinbach v. Leese*, 27 Cal. 297. Where the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process: *Chester v. Miller*, 13 Cal. 558; *Kelly v. Van Austin*, 17 Id. 564; *Hinchfield v. Franklin*, 6 Cal. 607.

5. An action was brought in a court, the judge of which was disqualified from hearing the case on account of relationship to one of the defendants. Some of the other defendants not appearing, the clerk entered a default against them. *Held*, that the entry of the default, being a ministerial act, was rightly made: *The People v. De Carillo*, 35 Cal. 37. If it does not appear affirmatively upon the face of a record of a court of general jurisdiction, that the court had jurisdiction of the defendant, that fact will be presumed, unless the record shows affirmatively that no jurisdiction was acquired: *Carpentier v. City of Oakland*, 30 Cal. 439. And it can be shown only by the record: *Id.*

No. 809.

Notice of Appearance.

State of California, } In the District Court,
City and County of }Judicial District.

A. B., Plaintiff,
 against
C. D., Defendant.

E. F. Esq., Attorney for Plaintiff A. B.

SIR:

Please take notice that the defendant C. D. hereby appears in this action by the undersigned, his attorney.

G. H.,

[DATE.]

Attorney for Defendant.

1. **Appearance.**—A party to an action may appear in his own person or by attorney, but he cannot do both; and if he appears by attorney, he cannot assume the control of the case: *Board of Commissioners v. Younger*, 29 Cal. 147. While an attorney of record remains such, his right to manage and control the action cannot be questioned by the opposite party: *Board of Commissioners v. Younger*, 29 Cal. 147. Courts will not presume the appearance of a defendant not regularly served, merely because a continuance was ordered after default taken: *Norblett v. Farwell*, 38 Cal. 155. Where counsel ex-

pressly appears for certain defendants in an action, his signature to papers in the case after that time as attorney for the defendants, will be construed as limited to those for whom he expressly appeared: *Spangel v. Dellinger*, 42 Cal. 148. Where plaintiff amended his complaint by adding two new parties defendant, and these defendants filed an acknowledgment of "service of summons and a copy of the complaint" and "consent that the decree herein prayed for by plaintiff be entered:" *Held*, a sufficient appearance to authorize a decree against them: *Foot v. Richmond*, 42 Cal. 439. An appearance in the probate court of an executor, in proceedings relating to an estate is a waiver of citation: *Est. of Johnson v. Tyson*, 45 Id. 257. An appearance is a proceeding in court and must constitute a part of the record: *McCormack v. First Nat. Bk. of Greensburgh*, 53 Ind. 466. The appearance of a defendant who has not been served with notice, to testify as a witness does not constitute an appearance bringing within the jurisdiction of the court as a party: *Nixon v. Downey*, 42 Ia. 78; see, also, Cal. Code C. P., secs. 406, 416 and 1014.

2. Appearance by Attorney.—Under our practice, at any time after the commencement of an action, any one or all of the defendants may appear by attorney without service of summons, and the defendant so appearing must plead to the action within the same time thereafter as he would had the summons been served upon him. An appearance entered by attorney whether authorized or not, is a good and sufficient appearance to bind the party: *Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 Cal. 191; *Turner v. Caruthers*, 17 Id. 431. Appearance by attorney, whether authorized or not, at common law, and by express letter of our statute, is a waiver of service: *Suydam v. Pitcher*, 4 Cal. 280. And a waiver of all defects in summons or previous proceedings: *Webb v. Mott*, 6 How. Pr. 440; *Dole v. Manley*, 11 How. Pr. 138; *Hyde v. Patterson*, 1 Abb. Pr. 248; *Bierce v. Smith*, 2 Id. 411. And of all irregularity in the original process: *Knox v. Summers*, 3 Cranch, 496; *Gracie v. Palmer*, 8 Wheat. 699. If an attorney appears for a defendant in a court of general jurisdiction, this appearance gives the court jurisdiction of the person of defendant; and if the attorney appeared without authority, that fact cannot be shown as a defense at law, in a suit upon the judgment: *Carpentier v. City of Oakland*, 30 Cal. 439.

3. Appearance by Mistake.—If an attorney appears for a part only of defendants, and inadvertently answers for all, and obtains leave of court to withdraw his answer, and substitute a new one answering for the party only for whom he appears, the court acquires jurisdiction only of those for whom he appears: *Forbes v. Hyde*, 31 Cal. 342.

4. Attorney's Authority to Appear.—Attorneys are officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in the proceedings only by the license of the court: *Clark v. Willett*, 35 Cal. 534. And his license is *prima facie* evidence of his authority to appear for the person whom he professes to represent; but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer, either upon the direct application of the person represented, or upon motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made: *Clark v. Willett*, 35 Cal. 534. The practice of permitting appearance without producing a warrant of attorney is as applicable

to appearance for a corporation as for a natural person: *Osborn v. Bank of United States*, 9 Wheat. 738.

5. Attorney's Authority Presumed.—An attorney of the court, who institutes suit in the name of plaintiff, is presumed *prima facie* to have authority, and the adverse party or his attorney cannot, upon mere suggestion at the bar, deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit: *Turner v. Caruthers*, 17 Cal. 431. The authority of an attorney at law to appear for parties for whom he enters an appearance in an action, will be presumed where nothing to the contrary appears: *Hayes v. Shattuck*, 21 Cal. 51; *Wilson v. Cleveland*, 30 Cal. 192; *Holmes v. Rogers*, 13 Cal. 191. It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground: *Id.* And if an attorney has been admitted to practice in another state, and has been accustomed to practice here, and has been recognized by the courts and bar here as a member of the bar, he is *de facto* an officer of the courts of this state; and an entry of appearance by such attorney is of the same effect as though he had been admitted to practice in this state: *Garrison v. McGowan*, 48 Cal. 592.

6. Counties—Suit by and against.—Boards of supervisors have power to employ other counsel than the district attorney to assist in or to conduct the prosecution or defense of any suit to which the county is a party, which power extends equally to suits to which it is a party upon the record, and to those in the prosecution or defense of which it has or is supposed to have some interest. The judgment and discretion of the board in the exercise of this power are not open to review by the courts: *Hornblower v. Duden*, 35 Cal. 664.

7. Husband and wife.—To constitute an appearance there must be some act done or word spoken in court by the party charged with appearing. A recital in the record that “now come the parties by counsel and the plaintiff withdraws” a paragraph of his complaint, and that one of the defendants (being the husband) filed his answer, held not to show an appearance by the wife: *Rhoades v. Delaney*, 50 Ind. 468.

8. Infants.—Where in a suit against infants there was no personal service upon them, but their general guardian appeared and defended for them; *held* that such appearance gave the court jurisdiction of their persons: *Smith v. McDonald*, 42 Cal. 484.

9. Motion.—A party who appears and contests a motion in the court below, cannot object, on appeal, that he had no notice: *Reynolds v. Harris*, 14 Cal. 669. And if counsel appears to a motion, the presumption is that he appeared to oppose, not to consent to the order sought: *Borkheim v. N. B. & M. Ins. Co.*, 38 Id. 623. An appearance to defend a motion is a waiver of notice: *Brown v. State*, 8 Heisk. (Tenn.) 871. A defendant has a right to appear for the special purpose of moving to dismiss a defective summons, and if the court denies the motion, a general appearance and answer afterwards do not waive the right or cure the error, if any: *Lyman v. Milton*, 44 Cal. 630. Such motion may be made without entering an appearance in the action: *Eldridge v. Kay*, 45 Id. 49. And a notice that defendant appears for the sole purpose of such a motion is sufficient to entitle him to be heard thereon:

Lander v. Fleming, 47 Id. 615. If such motion is denied, defendant may answer without waiving the benefit of an exception to the order denying his motion: *Kent v. West*, 50 Id. 185. Where a petition is filed and defendant moved to strike from the files all the papers in the action on the ground of irregularities and defects: *Held*, that this was an entry of appearance: *Ma-holm v. Marshall*, 29 O. St. 611. So, also, a motion to set aside a judgment partly on the ground of want of jurisdiction of the defendant, and partly on the ground of mere irregularities consistent with the fact of jurisdiction: *Held*, a general appearance, and waiver of any defect in service of process: *Blackburn v. Sweet*, 38 Wis. 578.

10. Partners.—To a libel against three partners, one appeared and put in a plea in behalf of himself and his copartners, to which the plaintiff replied as to a plea of the firm, and the rejoinder was signed by the “proctor for the defendants:” *Held*, a sufficient legal appearance of all the defendants to sustain the judgment against them: *Hills v. Ross*, 3 Dall. 331.

11. Signature of Attorney.—If the answer has the signature of the attorney of record and that of an associate attorney attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority: *Wilson v. Cleaveland*, 30 Cal. 192. It is well settled that courts will take judicial cognizance of the signatures of their officers as such; but there is no rule which extends such notice to the signature of the parties to a cause: *Alderson v. Bell*, 9 Cal. 315.

12. Rights of Party Appearing.—After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail: Cal. Code C. P., sec. 1014. A stipulation, signed by plaintiffs and some of the defendants to an action for a settlement and dismissal of the action is not such an appearance as entitles the defendants to notice of further proceedings in the action: *Grant v. Schmidt*, 22 Minn. 1.

13. State.—In an action against a state, a demurrer signed by the attorney-general, as such, he being a practitioner in the court: *Held*, an appearance for the state: *New Jersey v. New York*, 6 Pet. 323. If the state shall neglect or refuse to appear upon due service of process, no coercive measures will be taken to compel appearance, but the plaintiff will be allowed to proceed *ex parte*: *Massachusetts v. Rhode Island*, 12 Pet. 755; *New Jersey v. New York*, 5 Id. 284.

14. Stipulation of an Attorney.—An attorney at law for one of the parties, in a proceeding in a county court to determine conflicting claims to town lots, cannot, after the board of trustees of the town have awarded the lots to his client, pass the client's right or title by a stipulation in the case for the entry of a void judgment: *Ryan v. Tomlinson*, 31 Cal. 11. If plaintiff's attorney stipulates that a party may file an answer *nunc pro tunc* as of a certain date, he is estopped from saying that such defendant was not a party to the action on that date: *Lawrence v. Ballou*, 50 Cal. 258. As to power of attorney to bind client see Cal. Code C. P., sec. 283.

15. Withdrawal of Appearance.—A withdrawal “without prejudice to the plaintiff” of a general appearance entered by an attorney for the de-

fendant, means that the rights of plaintiff are not to be unfavorably affected by such withdrawal; and where defects in service had been healed by such appearance, they could not again be taken advantage of on account of the withdrawal: *Creighton v. Kerr*, 20 Wall. 8. Nor can a party served by publication who answers, be allowed to avoid the effect of such appearance and have the case proceed as though he had been so served and had not answered, by withdrawing his answer and paying fees: *Williams v. Huling*, 43 Tex. 113.

CHAPTER IV.

NOTICE OF LIS PENDENS.

No. 810.

i. *Notice of Suit in Foreclosure.*

State of California,	}	In the District Court,
City and County of.....	Judicial District.

A. B., plaintiff,	}
<i>against</i>	
C. D., Defendant.	

Notice is hereby given that a suit has been commenced in said court, by the above-named plaintiff, against the above-named defendant, which suit is now pending; that the object of said suit is to foreclose and determine the lien of a certain mortgage, of date....., executed by said defendant to said plaintiff, and recorded in the Recorder's office of said County of....., in Liber.... of Mortgages, at page.....; and to foreclose the defendant's equity of redemption in and to the premises described in said mortgage. Said premises are described as follows, viz.: [Insert description].

[DATE.]

E. F.,
Attorney for Plaintiff.

1. Actual Notice.—Where, after the commencement of an action of ejectment against a tenant, he gave notice to his landlord, and requested him to defend, and the latter employed an attorney to conduct the suit, it was held that the actual notice given to the landlord was, as to him, equivalent to the filing of a *lis pendens*, and in an equal degree made the subsequent judgment obligatory upon him: *Sampson v. Ohleyer*, 22 Cal. 200. So also actual notice of the pendency of a suit in foreclosure is the same in effect, to the party receiving it, as if notice of *lis pendens* had been filed: *Sharp v. Lumley*, 34 Id. 611.

2. Commencement of Suit as Notice.—The commencement of a suit in chancery is only constructive notice of the pendency of such suit, as against persons who acquired an interest under a defendant *pendente lite*:

Stuyvesant v. Hall, 2 Barb. Ch. 151. The mere pendency of a suit, where the bill does not lay claim to any specific land, nor to all the land of defendant in a particular county or place, but asks merely for a discovery of any land in which he has invested money, is not a constructive notice of an equity in any particular piece of land held by defendant: *Griffith v. Griffith*, 9 Paige, 315. The commencement of an equitable action by service of summons and injunction creates a *lis pendens* and a lien in the nature of an attachment, but the plaintiff is bound to prosecute diligently to retain the lien: *Myrick v. Selden*, 36 Barb. 15. Mere issuing of the subpoena is not sufficient to create a *lis pendens* as against a purchaser, without actual notice. Service is necessary, though it need not be personal: *Hayden v. Bucklin*, 9 Paige, 512. But filing a bill, and attempting to serve the subpoena, are sufficient against the defendant and a purchaser with notice: *Weed v. Small*, 3 Sandf. Ch. 273; *Hayden v. Bucklin*, 9 Paige, 512. Until the process is served in publication made, the doctrine of *lis pendens* does not apply: *Games v. Dunn*, 14 Pet. 322; affirming S. C., 1 McLean, 321; to nearly same effect, *Fowler v. Byrd*, Hempst. 213. But this cannot be the rule, except in those states where the action is commenced by service of summons. In California the complaint precedes the summons, and the one must be filed, and the other issued, before the action is deemed commenced. In a suit to foreclose a mortgage held by a copartnership, whenever any member of the copartnership is served with a summons a *lis pendens* is at once created to such an extent that no person can purchase from any member of the firm any portion of the subject-matter of the action so as to affect the rights of the plaintiff: *Dresser v. Wood*, 15 Kan. 360. As to service by publication see *Bayer v. Cockerill*, 3 Id. 282. See also *Knowles v. Rablin*, 20 Ia. 101.

3. Actions to which it Applies.—The object of the notice is to give the opportunity of defense and also to notify third persons of the litigation: *Richardson v. White*, 18 Cal. 102; *Sampson v. Ohleyer*, 22 Id. 200; *Horn v. Jones*, 28 Id. 194; *Sharp v. Lumley*, 34 Id. 612. It does not apply to proceedings before a board of supervisors for condemnation of land for road purposes: *Curran v. Shattuck*, 24 Id. 427. It applies to all actions affecting the title to real property: Cal. Code C. P., sec. 409. The right to file notice of *lis pendens* in such actions is an absolute one: *Mills v. Bliss*, 55 N. Y. 139.

4. Constructive Notice.—A *lis pendens* is constructive notice to a purchaser, and he and his interest will be bound by the decree entered in the suit: *Harrington v. Slade*, 22 Barb. 161; *Sears v. Hyer*, 1 Paige, 483. The only way to charge a purchaser of property pending a suit with constructive notice of the suit is by filing a notice of *lis pendens* according to the statute: *Ault v. Gassaway*, 18 Cal. 205. From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser, or incumbrance of the property affected thereby: Cal. Code C. P., sec. 409. This notice applies to parties to the action and purchasers under them subsequent to filing the notice: *People v. Conolly*, 8 Abb. Pr. 128; *Chapman v. West*, 17 N. Y. 125. And is as effectual as an injunction: *Stevenson v. Fayerweather*, 21 How. Pr. 449.

5. Creditor's Suit.—Where notice of the pendency of a suit against a conveyance in fraud of creditors has been filed, a conveyance of the property made since the filing of the bill cannot affect the complainant's rights: *Beckman v. Montgomery*, 1 McCarter, N. J. 106. A creditor's bill, to be a *lis*

pendens, must be so definite in the description of the estate as that any one reading it can learn thereby what property is the subject of litigation: *Miller v. Sherry*, 2 Wall. U. S. 237.

6. County Bonds.—A bill was filed enjoining a county from issuing bonds, and injunction was granted subsequently. A statute was passed authorizing the issue, and the issue was made. A year after the statute, another bill was brought to declare the bonds invalid, but they were decreed good. Two years after this decree, a bill of review was brought, and the former decree reversed: *Held*, that the bonds were not issued *pendente lite*: *Lee County v. Rogers*, 7 Wall. U. S. 181.

7. Dismissal.—Where a suit is dismissed and afterwards reinstated, the doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of the suit: *Herrington v. McCollum*, 73 Ill. 476.

8. Effect of Lis Pendens.—Its effect is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment which may be rendered in the suit in which notice is given: *Gregory v. Haynes*, 13 Cal. 594; *Haynes v. Calderwood*, 23 Id. 409; *Hurlbutt v. Butenop*, 27 Cal. 50. And it abrogates the rule, making the mere pendency of an action constructive notice: *Sampson v. Ohleyer*, 22 Cal. 200. Our statute does not give any new rights to the plaintiff, but limits rights which he had before. It simply adds to the common law rule a single term, to wit, to require for constructive notice, not only a suit, but filing notice of it; and there is no distinction, under the statute, between different kinds of interest in or title to real estate: *Richardson v. White*, 18 Cal. 102; *Sampson v. Ohleyer*, 22 Id. 200; *Horn v. Jones*, 28 Id. 194; *Hall v. Nelson*, 14 How. Pr. 32. Notice by *lis pendens* does not extend so as to affect those who claim under parties who were not parties to the litigation: *Scarlett v. Gorham*, 28 Ill. 319. A *lis pendens* does not operate as notice, unless the court has jurisdiction of the thing: *Carrington v. Brents*, 1 McLean, 167. As to whether a notice of *lis pendens* filed by plaintiff imparts notice to a purchaser from him pending the suit, so that a judgment adverse to the plaintiff would bind such purchaser, see *Corwin v. Bensley*, 43 Cal. 259, 263. The only office of the *lis pendens* is to give constructive notice to, and bind by the subsequent proceedings, those who deal with the defendant in regard to the property involved in the action during its pendency and before judgment. No notice is necessary to bind a purchaser or incumbrancer after judgment: *Sheridan v. Andrews*, 49 N. Y. 478; *Abadie v. Lobero*, 36 Cal. 390.

9. Effect of Neglect to File.—If notice of *lis pendens* be not filed, plaintiff cannot successfully set up that notice would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor: *Richardson v. White*, 18 Cal. 102; *Sampson v. Ohleyer*, 22 Id. 200; *Horn v. Jones*, 28 Id. 194.

10. Lien of Decree.—Where a party having notice of the pendency of a suit to reach the equitable interests of a judgment-debtor in his lands, purchases such lands, and enters upon and improves the same, he cannot come into equity for relief, to have his improvements discharged from the lien of the decree rendered against the land: *Patterson v. Brown*, 32 N. Y. 81. It cannot be said that a case is no longer *lis pendens*, after a decree and sale, and a conveyance executed because a court of chancery is not *functus officio* until the decree is executed by delivery of possession: *Jackson v. Warren*, 32 Ill. 331.

11. Must be Filed.—It must be filed or appear of record to charge the purchaser of the subject-matter of the suit as a purchaser *pendente lite* at common law. Mere pendency of the suit does not so charge the purchaser: *Head v. Fordyce*, 17 Cal. 149; *Ault v. Gassaway*, 18 Cal. 205. If no notice of *lis pendens* is filed, a *bona fide* purchaser of land, without notice of proceedings pending for its condemnation at time of purchase, is not affected by the proceedings: *Beasley v. Mountain Lake Water Company*, 13 Cal. 306; *Richardson v. White*, 18 Cal. 102.

12. New Notice, when Necessary.—In case of an amendment of the complaint, by adding new parties, or making a change in the description of the premises or in the amount of the claim, a new notice must be filed: *Clark v. Havens*, Clarke Ch. 560; *Curtis v. Hitchcock*, 10 Paige, 399. This is not necessary except as to such new parties, so that when they are subsequently struck out again, no new notice is necessary: *Waring v. Waring*, 7 Abb. Pr. 472. But even where parties are struck out, the safer practice is to file a new notice: *Curtis v. Hitchcock*, 10 Paige, 399.

13. Notice, what to Contain.—Notice should contain the name of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer: Cal. Code C. P. sec. 409. If it contain the necessary matters including description of the property, but adds a conclusion stating that "the following real estate is intended to be affected," and then adds a second description of the property which is erroneous, this second false description does not vitiate the notice if it would have been good without it: *Watson v. Wilcox*, 39 Wis. 643.

14. Partition.—Immediately after filing the complaint in the district court, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing it shall be deemed notice to all persons: Cal. Code C. P. sec. 755.

15. Premises included.—Notice of the pendency of an action should not include premises not seized by the sheriff under an attachment: *Fitzgerald v. Blake*, 42 Barb. 513. What description of lands in a bill is sufficient to put a purchaser on inquiry: See *Green v. Slayter*, 4 Johns. Ch. 38; compare *Parks v. Jackson*, 11 Wend. 442.

16. Purchaser pendente lite.—A purchaser *pendente lite* is subject to all the equities of the party under whom he claims: *McPherson v. Housel*, 2 Beasley (N. J.), 299. One who takes an assignment as indemnity against a precedent liability is not a purchaser within the meaning of the statute requiring notice of the pendency of the suit to be filed: *Leavit v. Tylee*, 1 Sandf. Ch. 207. One who purchases land pending an action to foreclose a mortgage on it, or after final judgment, with notice of the pending action, or of the judgment, is bound by the judgment. If no notice of *lis pendens* has been filed, and he purchases without notice, after entry of default, but before final judgment, he is not bound by the judgment, even if a final judgment gives constructive notice to parties dealing with the subject-matter, and a second purchaser is in no worse position than his grantor: *Abadie v. Lobero*, 36 Cal. 390. An action is pending after default, and until final judgment is

entered. But a purchaser with notice occupies the same position as his grantor, in reference to the issuance of a writ of assistance to the purchaser under the decree: *Montgomery v. Byers*, 21 Cal. 107.

17. Purchaser bound by decree.—A person purchasing during the litigation, a notice of *lis pendens* being on file, is bound by the decree in such suit: *Hurlbut v. Butenop*, 27 Cal. 50; *Calderwood v. Tevis*, 23 Id. 335; *Horn v. Jones*, 28 Id. 194; *Zeiter v. Bowman*, 6 Barb. 133; *Griswold v. Miller*, 15 Id. 520; *Cleaveland v. Boerum*, 23 Id. 201; 27 Id. 252; 3 Abb. Pr. 294. But it does not apply to one whose interest subsisted before the suit was commenced, and who might have been an original party: *Hopkins v. McLaren*, 4 Cow. 667; *Parks v. Jackson*, 11 Wend. 442. A purchaser of mortgaged premises who neglects to have his deed recorded until after the filing of the *lis pendens* for the foreclosure of the mortgage, is precluded from asserting title under it as against the purchaser at the foreclosure sale: *Ostrom v. McCann*, 21 How. Pr. 431.

18. Subsequent Purchaser.—The record of a chancery suit wherein a conveyance of land is decreed is not constructive notice, binding upon subsequent purchasers from the party decreed to convey, until after it has been recorded in the county where the land is situated: *Rosser v. Bingham*, 17 Ind. 542.

19. Tax Suit.—In an action to enforce the lien of a tax by a sale of the property, it is not necessary to file a *lis pendens*: *Reeve v. Kennedy*, 43 Cal. 643.

20. United States Courts.—The statute of California relating to the filing of *lis pendens*, does not apply to suitors except in the state courts. Neither that statute nor any equivalent proceeding, has been incorporated into the rules of the United States supreme court, as applicable to suits in equity, nor into the rules of the United States circuit court for the ninth circuit: *Majors v. Cowell*, 51 Cal. 478.

21. When to be Filed.—In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated a notice of the pendency of the action: Cal. Code C. P. sec. 409. A purchaser of real property, pending suit affecting the title to it, is not bound by the judgment, unless notice of *lis pendens* be filed with the county recorder before the purchase: *Richardson v. White*, 18 Cal. 102. The court has no power to take from the files a *lis pendens* regularly filed: *Pratt v. Hoag*, 12 How. Pr. 215.

No. 811.

Notice of Suit in Partition.

[TITLE.]

Notice is hereby given that an action has been commenced in the District Court of the Judicial District of the State of, in and for the County of, by the above-named plaintiff, against the above-named defendant, which suit is now pending. That the object of said suit is to obtain partition between plaintiff and defendant of the premises mentioned in the complaint in said action, and

hereinafter described according to the rights of the parties therein; that the premises affected by the suit, are situated in said City and County, and are described as follows, to wit: [describe property].

[DATE.]

E. F.,
Attorney for Plaintiff.

No. 812.

Notice of Pendency of Action of Ejectment.

[TITLE.]

Notice is hereby given, that an action has been commenced in the District Court of the.....Judicial District of the State of....., in and for the City and County of....., by the above-named plaintiff, against the above-named defendant, to recover certain real estate, and the possession thereof, with damages for the withholding thereof; and that the premises affected by this suit are situated in the said City and County, and are bounded and described as follows, to wit: [describe property.]

[DATE.]

[SIGNATURE.]

No. 813.

Notice of Pendency of Action to Quiet Title.

[TITLE.]

Notice is hereby given, that an action has been commenced in the District Court of the.....Judicial District of the State of....., in and for the County of....., by the above-named plaintiff, against the above-named defendant, to quiet the title to the premises and real estate in the complaint in the said action, and hereinafter described, and to determine all and every claim, estate or interest therein of said defendants, or either or any of them, adverse to the said plaintiff, and that the premises affected by this suit are situated in said County, and are bounded and described as follows, to wit: [describe the premises.]

[DATE.]

A. B.,
Attorney for Plaintiff.

CHAPTER V.

CHANGE OF PLACE OF TRIAL.

1. After service of summons and copy of complaint, the attorney for defendant should make inquiry by examining the complaint, as to whether the action is brought in the proper county, and if it is not, the first thing to be done is to move the Court for a change of the place of trial, under Section 397 of the California Code C. P. This may be done upon affidavit of merits and notice to the plaintiff. In California, the notice to be given as to time is, five days before the time appointed for the hearing, when the Court is held in the same district with both parties; otherwise ten days, unless the notice is served by mail: Cal. Code C. P., sec. 1005. As to which is the proper county, see Cal. Code C. P., secs. 392 to 395.

2. The plaintiff in an action may have the place of trial changed upon a proper showing, and upon a proper showing it is error in the Court to refuse: *Grewell v. Walden*, 23 Cal. 168-9. Where, however, there are conflicting grounds, or if the motion be made on the ground of the convenience of witnesses, and there are conflicting affidavits, the court may exercise its discretion, and its ruling will not be disturbed except in cases where this discretion has been abused. The mere preponderance of witnesses on one side is not necessarily decisive of the motion: *Hanchett v. Finch*, 47 Cal. 192. Our statute prescribes that it may be done in the following instances: First. When the county designated in the complaint is not the proper county; Second. Where there is reason to believe that an impartial trial cannot be had therein; Third. When the convenience of witnesses and the ends of justice would be promoted by the change; Fourth. When, from any cause, the Judge is disqualified from acting: Cal. Code C. P., sec. 397; Laws of Idaho, sec. 21; Arizona, sec. 21; N. Y. Code, sec. 987. The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place, as the Court

is not bound of its own motion to change the venue: *Watts v. White*, 13 Cal. 321; see *Pearkes v. Freer*, 9 Cal. 642. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county: Cal. Code C. P., sec. 396.

3. Where the objection appears on the face of the complaint, the motion should be made before or at the time of filing a demurrer or it will be deemed waived. *Pearkes v. Freer*, 9 Cal. 642; *Jones v. Frost*, 28 Cal. 245. Or before answer. It comes too late after an answer to the merits: *Tooms v. Randall*, 3 Cal. 438; *Reyes v. Sanford*, 5 Id. 117. But the right to move for a change of place of trial is not waived if the notice of the motion is given at the same time at which the answer and demurrer are filed and served: *Mahe v. Reynolds*, 38 Cal. 560. A stipulation by plaintiff changing place of trial to a proper county, though not named by defendant in his demand, was held effectual to work a change under this section: *Philbrick v. Boyd*, 16 Abb. Pr. 393.

NOTE.—It may be remarked that, as this proceeding is entirely statutory, and the former practice in New York differed quite materially from that in California, the decisions in New York have generally but little application under the California practice.

No. 818.

Demand for Change.

[TITLE.]

I hereby demand that the place of trial of this cause be changed to the proper county, viz., the county of

[DATE.]

[SIGNATURE.]

[ADDRESS.]

1. Demand.—In New York, to procure a change of the place of trial, in case the county named is not the proper county, a demand is first necessary, the service of which is an essential prerequisite to the motion: N. Y. Code, Ed: 1877, sec. 986; *Vermont Cent. R. R. Co. v. Northern R. R. Co.*, 6 How. Pr. 106. And if the plaintiff fails to consent to the demand, application must be made to the court: *March v. Lowry*, 16 How. Pr. 41; 26 Barb. 197; *Houck v. Lasher*, 17 How. Pr. 520. A demand is now necessary also in California, where the ground of removal is that the action is not brought in the proper county: See par. 2, *ante*, and Cal. Code C. P., sec. 396. The object of the demand in California, however, is not very apparent, since there is no provision for removal by consent as under secs. 985 and 986 of the N. Y. Code,

nor is there any provision for any action by the court upon the demand, nor does the demand do away with the necessity for notice of the motion to change; and the only provision authorizing the removal is in Cal Code, C. P., sec. 397. "The court may, on motion, change the place of trial, etc." It has been held by some of the district courts that service of notice of motion to change the place of trial is a sufficient demand. The supreme court has not passed upon the question.

2. Statement in Demand.—In the demand, the name of the proper county to which a removal is sought, must be inserted: *Beardsley v. Dickerson*, 4 How. Pr. 81. And service must be made on the opposite counsel before the time for answering expires: *Milligan v. Brophy*, 2 Code R. 118. But it may be made simultaneously with the service of the answer: *Mairs v. Remsen*, 3 Id. 138. But not after, although defendant answered before his time had expired: *Milligan v. Brophy*, 2 Code R. 118. Either party may move when an impartial trial could not be had, or when convenience of witnesses would be promoted: *Hinchman v. Butler*, 7 How. Pr. 462. A demand specifying an improper county is irregular: *Beardsley v. Dickerson*, 4 How. Pr. 81. On a demand there must be an order or consent; mere service of demand is not sufficient: *Hasbrouck v. McAdam*, 4 How. Pr. 342; 3 Code R. 39. In a demand to change the place of trial to the proper county, any suggestion as to which is the proper county is surplusage: *Philbrick v. Boyd*, 16 Abb. Pr. 393. Under the present New York code the demand must specify the county where the defendant requires the action to be tried: N. Y. Code, sec. 986. And such would seem the better practice in California.

No. 819.

Form of Notice.

[TITLE.]

To, Attorney for Plaintiff.

You will please take notice that the defendant will move this Court, at the court-room thereof,, on the day of, 187 ., at ten o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, for an order changing the place of trial of this action to the District Court of the Judicial District of this State, in and for the County of Said motion will be made upon affidavits, copies of which are herewith served upon you, and upon the demand to change the place of trial, and the papers on file in the case, upon the following grounds:

I. That the property in controversy is situated in said County.

II. That the defendants are both residents of said county.

III. That this is an action against defendant,

for an act done by him in virtue of his office, said defendant being sheriff of county.

[DATE.]

A. B.,
Defendants' Attorney.

NOTE.—The applicant may give other statutory reasons according to the facts in each particular case.

3. Joinder of Defendants.—The rule is well settled that all of the defendants must join in the application for a change of venue, or a good reason shown why they do not; otherwise it will be denied: *Sailly v. Hutton*, 6 Wend. 508. *Legg v. Dorshiem*, 19 Wend. 700; *Welling v. Sweet*, 1 How. Pr. 156; *Simmons v. McDougall*, 2 Id. 77. That the motion may be made by one of several defendants, see *Mairs v. Remson*, 3 Code R. 138; *Job v. Butterfield*, 1 Eng. Law and Eq., 417; on notice to the other defendants, unless they be in default. Or a defendant subsequently served, after a similar motion by another defendant has been denied, may move for a change of place of trial: *N. J. Zinc Co. v. Blood*, 8 Abb. Pr. 148. This, however, seems questionable, and cannot be done where part of the defendants live in the county where the action is brought, if the motion is made on the ground that the action is not brought where defendants reside: See Cal. Code C. P., sec. 395.

No. 820.

Statement of Ground—Not the Proper County from Situation of Subject-Matter.

[Substitute in preceding form.]

That this is an action for the recovery of real property, [or of an estate, or interest therein, or for the determination in some form of such right or interest, or for injuries to real property], and that the said real property is wholly situate in the said last named county: (Cal. Code C. P., sec. 392, subd. 1.)

[Or, that this is an action for the partition of real property, which said property is wholly situate in the said county to which the desired change is asked]: (Cal. Code C. P., sec. 392, subd. 2.)

[Or, that this is an action for the foreclosure of a mortgage of [or lien upon] real property, and that the land in said mortgage [or lien] described is wholly situate in said last named county]: (Cal. Code C. P., sec. 392, subd. 3.)

4. Mining Claims.—Mining claims are real estate within the meaning of this act, and are governed by the provisions of this section. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case there is no discretion in the court, the change being a matter of right: *Watts v. White*, 13 Cal. 321.

*No. 821.**Statement of Ground—Not the County where the Cause of Action Arose.*

[Substitute in Form, No. 819.]

That this is an action for the recovery of a penalty or forfeiture imposed by statute, except, etc.: (see Cal. Code C. P., sec. 393, subd. 1); and that it arose in the said last-named county.

Or, That this is an action against defendant for an act done by him in virtue of his office, said defendant being the of said last-named county, and a resident thereof: (Cal. Code C. P., sec. 293, subd. 2); [or when the act complained of was done by, and suit was brought against a person who, by command of such officer, or in his aid, performed the act which is the subject of the action, add] and that such person is a resident of the last-named county, etc.

NOTE—It is not expected that each form given will exactly fit each case, as it arises in the practice—but the general form is deemed correct.

*No. 822.**Affidavit on the Ground of Non-Residence.*

[TITLE.]

[VENUE.]

A. B., the defendant in the above-entitled action, being duly sworn, deposes and says as follows:

I. The summons and complaint in this action were served on me on the day of, 187..

II. I further say, that I have fully and fairly stated the case in this cause to G. H., my counsel, who resides at No., in Street, in the City of, and after such statement I am by him advised and verily believe that I have a good and substantial defense on the merits to the action.

III. All the parties defendant to this action reside in the County of, in this State.

[JURAT.]

[SIGNATURE.]

5. Affidavit of Merits.—An affidavit of merits, which declares “that the defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense on the merits to the whole of the plaintiff’s demand, as he is advised by his said counsel, and verily believes to be true,” is sufficient: *Butler v. Mitchell*, 17 Wis. 52. The affidavit of merits must be made and served with notice of motion: *Lynch v. Mosher*, 4 How. Pr. 86. As to sufficiency of affidavit of merits, consult *Richards v. Sweetzer*, 1 Code Rep. 117; *Ellis v. Jones*, 6 How Pr. 296; 3 How. Pr. 413; *Jordan v. Garrison*, 6

How. Pr. 6; *Mixer v. Kuhn*, 4 How. Pr. 412. It is a common and convenient practice to combine the affidavit of merits with the affidavit of the ground on which the motion is made where the latter does not appear upon the face of the complaint and has to be established by affidavit.

6. Residence of Parties.—The principal place of business of a corporation is its residence, within the meaning of that term: *Jenkins v. Cal. Stage Co.*, 22 Cal. 537. A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the state, however remote from his residence. * * * To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of the defendant before suit, and failed: *Loehr v. Latham*, 15 Cal. 418. The motion to change on the ground of non-residence of defendant may be resisted on the ground that the convenience of witnesses requires the action to be retained where it is commenced; and the court may properly refuse to change the place of trial if it be shown that the convenience of witnesses requires its retention: *Hall v. C. P. R. R. Co.*, 49 Id. 454. Otherwise in Nevada; there the right to change for non-residence is absolute: *Williams v. Keller*, 6 Nev. 141.

No. 823.

Affidavit, on Ground of Partiality and Prejudice.

[TITLE.]

[VENUE.]

[Same as in Form No. 822, down to III.]

III. I have reason to believe and do believe that I cannot have a fair and impartial trial in said Court in which this action is brought, by reason of the interest, prejudice, and bias of the people of said County [give the facts].

A. B.

[JURAT.]

7. Circumstances.—It is necessary to state in the affidavit facts and circumstances which induce the belief that an impartial trial cannot be had, in order that the court may judge whether the belief is well founded; the affidavits of individuals to their belief that an impartial trial cannot be had is insufficient: *Bowman v. Ely*, 2 Wend. 250; *People v. Bodine*, 7 Hill, 147; *People v. Vermilye*, 7 Cow. 108, 137; *Scott v. Gibbs*, 2 Johns. Cas. 116; *Corp. of N. Y. v. Dawson*, Id. 335; *Sloan v. Smith*, 3 Cal. 410; *State v. Millian*, 3 Nev. 409.

8. Counties.—Actions against counties may be commenced and tried in any county in the judicial district in which said county is situated, unless such actions are between counties, in which case they may be commenced and tried in any county not a party thereto: Cal. Code C. P., sec. 394. In the absence of special statutory provision such suits are governed by the usual rules of civil practice; and where a county was sued in a judicial district of which it did not form a part, but appeared and answered without objecting to the jurisdiction; *Held*, that it thereby waived the right to a change of venue to its own district: *Clarke v. Lyon County*, 8 Nev. 181.

9. Evidence of Facts.—It has been said that an actual experiment should be first made by attempting to impanel a jury, or by at least one

trial of the cause: *Messenger v. Holmes*, 12 Wend. 203; *People v. Wright*, 5 How. Pr. 23. But this rule has not been sustained, and other circumstances than an actual trial are sometimes held sufficient evidence that an impartial trial cannot be had: *People v. Webb*, 1 Hill, 179; *People v. Long Island R. R. Co.*, 4 Park. Cr. 602; *Budge v. Northam*, 20 How. Pr. 248.

10. General Sentiments.—The general sentiments of the community respecting the merits of an exciting case may be such an obstacle to the administration of justice that a change should be ordered: *People v. Baker*, 3 Park. Cr. 187; S. C., 3 Abb. Pr. 42. But the court will not grant a change of venue on the ground that the prejudices of the people of the county are against turnpike roads, in an action where such a company is a party: *New Windsor Turnpike Co. v. Wilson*, 3 Cai. 127. Nor is it a ground for a change of venue that the people of the county in which the action is to be tried are generally interested in the question involved: *Conley v. Chedic*, 7 Nev. 336.

11. Granting Discretionary.—The granting or refusing of a change of venue, by reason of the bias and prejudice of the citizens of the county, is discretionary with the court, subject to revision only in cases of abuse: *Watson v. Whitney*, 23 Cal. 375.

12. Public Excitement.—In a clear case the place of trial of a cause may be changed on the ground of public excitement, although there has been no actual effort made to try the cause or to impanel a jury in the county where the venue is laid: 1 Hill, 179; *People v. Long Island R. R. Co.*, 4 Park. Cr. 602; 16 How. Pr. 106; *Budge v. Northam*, 20 Id. 248.

13. Public Influence.—In an action against a sheriff, the influence of his office in his county is not a reason for changing the venue: *Baker v. Sleight*, 2 Cai. 46.

14. Strong Prejudice.—The allegations in the affidavits of the defendants, that a strong prejudice exists in San Francisco, among persons likely to be called as jurors, against driving cattle through the streets of the city, and against persons engaged in that business, are not sufficient to show that he cannot have a fair and impartial trial in San Francisco. They furnish no affidavits of persons acquainted with the facts, nor do they state that they have made any inquiries of the citizens on which to base such an opinion: *Fickens v. Jones*, Cal. Sup. Ct., Oct. T., 1863, not reported. Where one hundred citizens united in employing counsel to prosecute the defendant: *Held*, to be a sufficient ground for a change of venue: *People v. Lee*, 5 Cal. 353.

15. Violent Party Spirit.—The court will not retain the venue on the ground that a violent party spirit prevails in the county to which it is moved to be changed. So held in an action for slander in reference to official acts: *Zobieskie v. Bauder*, 1 Cai. 487.

No. 824.

Affidavit—On Account of Convenience of Witnesses.

[TITLE.]

[VENUE.]

[Same as in No. 822, down to III.]

III. I have fully and fairly stated to my counsel the facts which I expect to prove by each and every one of the fol-

lowing witnesses, viz.: J. K., L. M., and O. P.; and each and every one of them are material and necessary witnesses for my defense on the trial of this cause, as I am advised by my said counsel, and verily believe, and that without the testimony of each and every one of the said witnesses, I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

IV. That each and every one of said witnesses resides in the county of, viz.: [State the residence of each].

V. The facts which I expect to prove by said witnesses are as follows: By J. K., the fact that, etc.; by L. M., that, etc.

[JURAT.]

[SIGNATURE]

16. By Whom Made.—The affidavit shall be made by the defendant himself, but may be made by defendant's attorney where special reasons are shown: *Scott v. Gibbs*, 2 Johns. Ch. 116.

17. Facts to be Proved.—The facts expected to be proved must be stated in the affidavit, and wherein they are material must be shown: *People v. Hayes*, 7 How. Pr. 248. And the facts that each is expected to prove should be specifically stated where there is any contest as to the convenience of witnesses: *Price v. Fort Edward Water Works*, 16 How. Pr. 51.

18. Granting Motion Discretionary.—The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial court, and subject to review only in cases of abuse: *Pierson v. McCahill*, 22 Cal. 127.

19. What Affidavit should State.—The motion is founded on affidavit, which if grounded on the convenience of witnesses, should state their names and residence. The statement that they are residents of the county merely is not sufficient: 6 Cow. 389; *Westbrook v. Merritt*, 1 How. Pr. 195; see *Pierce v. Gunn*, 3 Hill, 445; as the place of trial will be determined by the county in which the witnesses reside rather than by the distance they must travel: *Hull v. Hull*, 1 Hill, 671; *People v. Wright*, 5 How. Pr. 23. That each and every one is a necessary witness must appear, and that without the testimony of each he could not safely proceed is also essential: *Onondaga Co. Bk. v. Shepherd*, 19 Wend. 10; *Satterlee v. Groot*, 6 Cow. 33; 3 Id. 425; 6 Id. 389; *Constantine v. Dunham*, 9 Wend. 431. The words every one of them are held essential: Id. It must appear that the witnesses are necessary as well as material: *Satterlee v. Groot*, 6 Cow. 33; see *Young v. Scott*, 3 Hill, 32, 35. And wherein they are material; and that without them he cannot safely go to trial: 3 Wend. 425; 9 Id. 431. Very little reliance is placed by the courts upon a general allegation of the materiality of witnesses, unless it be shown wherein they are material: *People v. Hayes*, 7 How. Pr. 248.

20. What Affidavit should State.—The affidavit in New York should state, among other things that he fully and fairly stated his case to counsel: 9 Wend. 431; 3 Cow. 14; giving name and residence of such counsel, and has fully and fairly disclosed to him the facts which he expects to prove by

each: 9 Wend. 10; 1 How. Pr. 70, 165; 1 Hill, 668; *Am. Ex. Bk. v. Hill*, 22 How. Pr. 29; and that he has a good and substantial defense upon the merits: 1 How. Pr. 162. When defendant is himself a counselor, the affidavit may be modified accordingly: *Cromwell v. Van Rensselaer*, 3 Cow. 346. It should also state the name of the county designated in the complaint as the county of trial: 1 How. Pr. 184; 1 Hill, 668. And if not made by all the defendants the reason why: 1 How. Pr. 156.

21. When Motion may be Made.—It would seem that in Nevada an application for change of venue for convenience of witnesses is proper after answer filed and cause set for trial: *Sheckles v. Sheckles*, 3 Nev. 404. The following New York authorities appear to sustain the proposition that a motion to change the place of trial on the ground of convenience of witnesses cannot be made before issue joined: *Mason v. Brown*, 6 How. Pr. 481, and cases cited. Or where the answer denied most of the material allegations of the complaint, and the time to answer was past: *Beardsley v. Dickerson*, 4 How. Pr. 81; that it should not be made before issue: *Merrill v. Grinnell*, 10 Id. 31; *Toll v. Cromwell*, 12 Id. 79; *Hubbard v. Nat. Ins. Co.*, 11 How. Pr. 149. This ground may be used by plaintiff to resist a motion to remove by defendant on the ground of non-residence: *Hall v. C. P. R. R. Co.*, 49 Cal. 454.

No. 825.

Affidavit on the Ground of Disqualification of the Judge.

[TITLE.]

[VENUE.]

C. D., the defendant above named, being duly sworn, deposes and says as follows:

I am informed, and verily believe, that the Honorable X. Y., Judge of the Court in which the complaint in this action is filed, is disqualified from presiding in the same [he being related to the plaintiff within three degrees of consanguinity, to wit: a brother of the plaintiff; or he having heretofore acted as counsel in this action on the part of the plaintiff].

[DATE.]

[SIGNATURE.]

NOTE.—This affidavit is rarely, if ever, made, as a rule; the bare suggestion to the judge of any one of these facts is sufficient. As to what constitute disqualifications, see Cal. Code C. P., sec. 170.

22. Bias or Prejudice.—Bias or prejudice on part of the judge constitutes no legal incapacity to sit on trial of a cause, nor is it a sufficient ground to authorize a change of place of trial: *People v. Williams*, 24 Cal. 31. The fact, alone, that the judge, on a previous trial of the same cause, made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind: *Id.*

23. Consanguinity.—A judge who is related to either of the parties to an action within the third degree of consanguinity, is incompetent to try an action between them: *Da la Guerra v. Burton*, 23 Cal. 592. If a judge is related to either of the parties to an action, by consanguinity or affinity

within the third degree, he is disqualified from acting in the case in any matter except in the arrangement of the calendar or regulation of the order of business: Cal. Code C. P., sec. 170, sub. 2. Even if no objection is made, he has no right to act, and ought, of his own motion, to decline to sit as judge. In such case, an order of the judge dismissing the action is void, on the ground of his incapacity to act: *People v. José Ramon de la Guerra*, 24 Cal. 73.

24. Counsel in the Case.—It was held sufficient cause that the judge where the venue was laid was, previous to his appointment, counsel in the cause: 2 Wend. 290; see Cal Code C. P., sec. 170, sub. 3. Where the probate judge held a power of attorney from certain persons claiming to be the heirs at law of the deceased, and authorizing him to receive for them all money and property which they might be entitled to from the estate, for which he was to receive a percentage upon the proceeds of the estate, and that these proceedings were instituted at the instance of said probate judge, a change of venue should be granted: *Estate of White*, 37 Cal. 190; citing *Oakley v. Aspinwall*, 3 N. Y. 547.

25. Information and Belief.—An affidavit made on application to change the place of trial, which states "that the judge, as the affiant is informed, and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained, or upon what the belief was based: *People v. Williams*, 24 Cal. 31. And we might add that such an affidavit, unless some facts are stated, ought to subject the party making it to punishment for contempt.

26. Partisan Feeling.—The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue, on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the disqualification of judges from that applied to jurors: *McCauley v. Weller*, 12 Cal. 500.

27. Transfer of Cause.—Where a judge is incapacitated to act as such, the action should be transferred—not dismissed; an order dismissing the action would be null and void: *Burton v. Covarrubias*, April Term, 1865, not reported.

No. 826.

Affidavit Resisting Motion for Change.

[TITLE.]

[VENUE.]

A. B., plaintiff above-named, being duly sworn, says as follows:

I. I have fully and fairly stated to E. F., my counsel in this cause, who resides at, in the County of, the facts which I expect to prove by each and every one of

the following witnesses, viz., G. H., of the town of, J. K., of the town of, L. W., of the town of; all of whom reside in said County of; and that they are, each and every one of them, material and necessary witnesses for me on the trial of this cause, as I am advised by said counsel, and as I verily believe; and that without the testimony of each and every one of said witnesses I cannot safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

II. That the facts which I expect to prove by said witnesses are as follows [state in detail the facts and circumstances expected to be proved by each witness, naming him, and the materiality of those facts].

[JURAT.]

[SIGNATURE.]

28. Convenience of Witnesses.—Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for trial in the court where it was commenced, the plaintiff should present that fact in opposition to the motion, and if he neglects to do so, it is doubtful whether he can afterwards apply to the court to which it has thus been removed, to have it sent back again: *Pierson v. McCahill*, 22 Cal. 127; *Hall v. C. P. R. R. Co.*, 49 Id. 454. The affidavits show that the acts complained of were committed in the city of San Francisco, and *prima facie* the convenience of witnesses would require that the action should be tried in that county. The affidavits of both parties show that a greater number of the witnesses to the act committed, and the injury caused thereby, reside in San Francisco; and even those who reside in Sonoma County can travel to San Francisco nearly as conveniently as to the county seat of the former county: *Fickens v. Jones*, October Term, 1863, not reported.

29. Form.—The plaintiff's affidavit should be in form and substance similar to that required of the defendant: *Onondaga Co. Bank v. Shepherd*, 19 Wend. 10; *American Exchange Bank v. Hill*, 22 How. Pr. 29. Affidavits to oppose a motion for a change of place of trial, on the ground of convenience of witnesses, as well as the moving affidavits, should state what is expected to be proved by the witnesses: *American Exchange Bank v. Hill*, 22 How Pr. 29.

30. Jurisdiction.—The voluntary appearance of a party resisting a change of venue gives the court jurisdiction over his person, and waives all prior informalities: *Powers v. Browder*, 13 Mo. 154.

31. Not the Proper County.—In New York a motion to change the place of trial, on the ground that the county named is not the proper county, cannot be resisted on the ground of convenience of witnesses: 7 How. Pr. 356; *International Life Assurance Co. v. Sweetland*, 14 Abb. Pr. 240; but a motion to change the place of trial back to the county named on that ground may be made: *Moore v. Gardner*, 5 Id. 243. As a matter of practice, in

California, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion: *Loehr v. Latham*, 15 Cal. 418; see *Jenkins v. California Stage Co.*, 22 Id. 537; *Hall v. C. P. R. R. Co.*, 49 Id. 454. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon application for this cause to transfer the trial to another county. The affidavit must state the names of the witnesses: *Loehr v. Latham*, 15 Cal. 418. As to opposition of plaintiff, on ground of convenience of witnesses, consult *Moore v. Gardner*, 3 Code Rep. 224; subsequent to which decision the law had been changed: See *Mason v. Brown*, 6 How. Pr. 483. In certain cases the doctrine of *Mason v. Brown* will not obtain: See *Park v. Carnley*, 7 How. Pr. 356.

32. Plaintiff may Oppose.—The plaintiff may oppose the motion by affidavit showing material witnesses (1 How. Pr. 56) residing in the county named as the county of trial: 2 Caine's Rep. 374; 3 Id. 95; 2 Johns. 481; 7 Cow. 102; 19 Wend. 10; and unqualifiedly that he has witnesses in or near the county named, of an equal or greater number than those named in defendant's affidavit: 12 Wend. 294; 1 Hill, 668, 671; 5 Cow. 414; *Austin v. Hinkley*, 13 How. Pr. 576. The motion for change of place of trial for convenience of witnesses will not in all cases be denied, where plaintiff's witnesses outnumber those of defendant: 5 Hill, 509; 1 How. Pr. 73.

33. Time.—Time to file counter-affidavits, on a motion to change the place of trial, is a matter of discretion in the lower court, and will not be reviewed on appeal: *Pierson v. McCahill*, 22 Cal. 127.

No. 827.

Order Denying Motion.

[Commencement as in form No. 22, vol. I, p. 153.]

[TITLE.]

The motion to change the place of trial in this action coming on regularly to be heard this day, A. B., Esq., appearing in favor of said motion, and C. D., Esq., appearing in opposition thereto, and the Court being duly advised, it is ordered that the motion to change the place of trial in this action be and the same is hereby denied [with.....dollars costs].

34. Dismissal—Effect of.—When two motions are pending in an action at the same time, one to change the venue, and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a virtual denial of the same: *People v. José Ramon de la Guerra*, 24 Cal. 73.

35. Motion—Too Late.—Where a motion was made to change the venue on the ground that neither of the parties resided in the district, where no objection was made in the answer, and after nearly six months had elapsed before the objection was taken: *Held*, that the motion came too late, and was properly rejected: *Tooms v. Randall*, 3 Cal. 438.

36. Order—Appeal from.—An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the court below until such an appeal is determined: *Pierson v. McCahill*, 23 Cal. 249. An order refusing a change of venue on the application of defendant in a criminal prosecution will only be reviewed in cases of gross abuse of discretion: *People v. Fisher*, 6 Cal. 154. But it is not to be supposed that the supreme court will trust implicitly in the discretion of inferior courts: *People v. Lee*, 5 Cal. 353.

37. When Motion will be Denied.—Motion will be denied when it is clear defendant's object is merely delay: 12 Wend. 293; 22 Id. 615. Or where by stipulation evidence is confined to facts occurring in the county where venue is laid: *Smith v. Averill*, 1 Barb. 28. Or where plaintiff undertook to bear all expenses of bringing defendant's witnesses: *Worthy v. Gilbert*, 4 Johns. 492; but see *Rathbone v. Harman*, 4 Wend. 208. Or where after service of papers for a motion to change venue, plaintiff amended his complaint changing the venue: 1 Hill, 374; or agreed to change the venue; or where defendant suffered a default: 4 Hill, 69. A change of venue is properly refused, unless a party has complied with the requisition of the statute: *Lewin v. Dille*, 17 Mo. 64. Probable delay of trial in the county which would otherwise be most convenient is a reason for refusing the change: *King v. Vanderbilt*, 7 How. Pr. 385; *Goodrich v. Vanderbilt*, Id. 467.

No. 828.

Order Granting Change of Place of Trial.

[Commencement as in preceding form.]

It is ordered that the place of trial of this action be and hereby is changed from the County of to the County of.....

38. Defective Affidavit.—The fact that the affidavit for a change of venue may be defective, will not render the order changing the venue a nullity, nor should the case be dismissed for this defect. The objection should be made at the time the petition for a change is acted upon: *Potter v. Adams*, 24 Mo. 159.

39. Judicial Action.—Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still if the court grants the application, it has acted judicially upon a matter within its cognizance, and where it was clothed with discretion, and by the order the place of trial becomes changed: *The People v. Sexton*, 24 Cal. 78. It is error in the court to refuse to change the place of trial upon a proper showing: *Grewell v. Walden*, 23 Cal. 165.

40. Proceedings and Practice.—If the defendant procures a change of venue, the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried: *Brooks v. Douglass*, 32 Cal. 208. On a motion to change the place of

trial, the costs were usually made to abide the event of the suit, whether the motion be granted or denied: *Gidney v. Spelman*, 6 Wend. 525; *Norton v. Rich*, 20 Johns. 475; but see *Worthy v. Gilbert*, 4 Id. 492. But it may be otherwise where plaintiff has not complied with a demand: *Hubbard v. National Protection Ins. Co.*, 11 How. Pr. 149. As to costs in special cases, see *Purdy v. Wardell*, 10 Wend. 619; *Donaldson v. Jackson*, 9 Id. 450.

41. Service of order.—In New York, a certified copy of this order must be served upon the plaintiff; otherwise the plaintiff may proceed as if the place of trial had not been changed: *Root v. Taylor*, 18 Johns. 335; *Keep v. Tyler*, 4 Cow. 541. An appearance and trial is a waiver of any irregularity in the change of venue: *Bettis v. Logan*, 2 Mo. 2.

42. Transfer of causes.—Causes may be removed from one district or county to another county or district, in the manner provided by the statute: *Reyes v. Sanford*, 5 Cal. 117. 1. Causes in a district court may be transferred to another district court; 2. Causes in a county court to some other county court; 3. Causes in a probate court to some other probate court; 4. Causes in a justice's court to another justice's court in the same county: Cal. Code C. P., sec. 398. The plaintiff commenced an action of forcible entry and detainer against the defendant, in a justice's court. The justice, instead of trying the case, certified it to the district court: *Held*, that the transfer was illegal, and could not defeat the plaintiff's rights by operating a discontinuance: *Larue v. Gaskins*, 5 Cal. 507.

No. 829.

Order to Transfer Cause to Another Court, on Account of Disability of the Judge.

[TITLE.]

It being shown to the Court by G. H., of counsel for the defendant, that the Judge of this Court was heretofore of counsel in a cause involving the same title which is in issue in this cause:

It is ordered, that this cause be transferred to the District Court of the Judicial District for trial.

No. 830.

Notice of Time and Place of Trial of Transferred Action.

[TITLE.]

To A. B., the plaintiff in the above-entitled action, and C. D., the defendant in said action:

You will please take notice that the said action, transferred to the above-entitled court from the Court of the Township, in County of, is set for trial before me, at my court-room in said Township, in said County, the day of, 187..., at o'clock, P. M.

J. P.,

[DATE.]

Justice of the Peace of said Township.

NOTE.—See Cal. Code C. P. sec. 836.

REMOVAL OF CAUSES FROM STATE TO UNITED STATES COURTS.

1. The principal statutes of the United States, authorizing and regulating the transfer of causes from the state courts to the courts of the United States, have been the acts of 1789, 1866, 1867 and 1875. The twelfth section of the judiciary act of 1789, the act of July 27, 1866, and of March 2, 1867, though technically repealed, are substantially embodied in section 639 of the revised statutes of the United States. There are other provisions of the statute covering the transfer of a limited number of special cases, but section 639 of the revised statutes, and the act of March 3, 1875 (adopted since the revised statutes, and not found therein), provide for nearly all the cases met with in ordinary practice. For the last-named act see acts of 1875, p. 470.

2. The special cases not falling within sec. 639 or the act of 1875, are the following: 1. Causes civil and criminal, in any state court, against persons denied civil rights: U. S. Rev. Stats. secs. 641, 642; 2. Suits, civil and criminal, against revenue officers of the United States, and against officers and other persons acting under the registration laws, *Id.* sec. 643; 3. Suits by aliens against civil officers of the United States, under specified circumstances: *Id.* sec. 644; and, 4. Suits against certain federal corporations, or their members as such: *Id.* sec. 640. This section is as follows:

“Any suit commenced in any court other than a circuit or district court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member, may be removed, for trial, in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution or of any treaty or law of the United States. Such removal, in all other respects shall be governed by the provisions of the preceding section.”

3. Under this section a petition for removal must state that the corporation or member applying for the removal “has a defense arising under or by virtue of the constitu-

tion of the United States, or some treaty or law of the United States," but the facts constituting the defense need not be stated, nor what the defense is: *Jones v. Oceanic Steam Nav. Co.*, 11 Blatchf. 406. In *Magee v. U. P. R. R. Co.*, 2 Saw. C. C. 447, which was an action for a personal injury to the plaintiff, and the only defense made by the answer was a denial of the negligence, the decision of which depended entirely upon common law principles, and did not involve the construction of any act of congress, the cause was, on motion, remanded to the state court. This decision was made by Hillyer, J., in 1873. In 1875, Justice Miller held the other way on the same state of facts: See *Turton v. U. P. R. R. Co.*, 3 Dillon C. C. 366. If the holding in the latter case is correct there would seem to be no necessity for requiring the verified statement, in the petition for removal, that the defendant has a defense under or by virtue of the constitution or some treaty or law of the United States; for if such defense arises from the mere fact of incorporation under a law of the United States, a statement that it is such corporation would evidently be sufficient; but *Jones v. Oceanic Steam Nav. Co.*, *supra*, holds that it is not sufficient. In the case of this corporation, however, the charter authorizes it to sue or be sued in the circuit court of the United States, and jurisdiction having been conferred by the action of the state court, it is not clear that it was improperly retained.

4. Section 639 of the revised statutes, and the act of 1875 are so important, that we copy the material parts:

Sec. 639. "Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. First. When the suit is against an alien, or is by a citizen of the state wherein it is brought, and against a citizen of another state, it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said state court. Second. When the suit is against an alien and a citizen

of the state wherein it is brought, or is by a citizen of such state against a citizen of the same and a citizen of another state, it may be so removed, as against said alien or citizen of another State, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court, as against the other defendants. Third. Where a suit is between a citizen of the state in which it is brought, and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said state court an affidavit stating that he has reason to believe, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court. In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in the cause; or, in said cases where a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the circuit court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original plead-

ings would have had by the laws and practice of the courts of such state if the cause had remained in the state court."

The first subdivision of this section contains the substance of section twelve of the Judiciary Act, subdivision two, the substance of the Act of July 27, 1866, and the third subdivision the substance of the Act of March 2, 1867. For these two acts see U. S. Stats. at Large, 306 and 558.

5. The second and third sections of the act of March 3, 1875 (acts of 1875, p. 470) are as follows: "Sec. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district.

Sec. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make or file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may

be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if such bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state; the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as heretofore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury."

Section 4 provides in substance that any attachments or sequestration had in the state courts shall continue to hold the goods or estate after the removal, that all bonds

and undertakings or security given in the state court shall remain valid and effectual, and that all injunctions, orders and other proceedings had prior to removal shall remain in full force until dissolved or modified by the circuit court.

Section 5 provides for remanding causes improperly transferred, and for review in the supreme court of order dismissing or remanding the cause.

Section 7 provides that if the next term of the circuit court to which any cause is removed under the act shall commence within twenty days after the order for transfer is made, the party transferring may have twenty days from the date of the order to file copy of the record and enter appearance in the circuit court. It also provides that a writ of certiorari may issue to the state court if the clerk refuses to give copy of the record on payment or tender of his fees, etc.: See 18 U. S. Stats. at Large, part 3, pp. 470-473.

SUBDIVISION 1, SECTION 639.

6. The right of an alien defendant, when sued alone, to remove the cause to the circuit court, is unqualified, except as to the amount in controversy, which must exceed five hundred dollars exclusive of costs. When sued with a citizen of the state where the action is brought, if, so far as it relates to him, the action is brought for the purpose of restraining or enjoining him; or if the controversy so far as he is concerned, can be finally determined without the presence of the other defendants, and the controversy involves the sum or value of five hundred dollars, he may have it removed.

7. To authorize a removal under subdivision 1, the petition must show: 1. That the plaintiff, or if more than one, then that all the plaintiffs are citizens of the state in which the action is brought; 2. That all the defendants are citizens of another state. Nominal parties, that is those who are not necessary to a determination of the real controversy, will not prevent a removal: *Ward v. Arredondo*, 1 Paine, 410; *Wood v. Davis*, 18 How. U. S. 467; *Mayor, etc., v. Cummins*, 47 Ga. 321. The fraudulent or improper joinder of parties will not prevent a removal: See *Smith v. Kines*, 2 Sumner, 338; *Ex parte Girard*, 3 Wall. jr. 263. As to improper joinder of causes of action, see *Cooke v. State Nat.*

Bk., 52 N. Y. 96. 3. That the sum or value involved in the case exceeds five hundred dollars, exclusive of costs. 4. That the order for removal is applied for by all the defendants. In *Davis v. Cook*, 9 Nev. 134, it was held that if a suit be brought against several non-resident joint-debtors in a state where the statute authorizes the plaintiff to proceed against the defendants served, and if he recover judgment, it may be enforced against the joint property of all, or the separate property of the defendants served, and the only defendants served are citizens of another state, such defendants are entitled to remove the cause into the circuit court, though the co-defendant not served does not join in the application: See also *Merwin v. Wexel*, 49 How. Pr. 115. Whether after removal, in such a case, the plaintiff is entitled to process to bring in the other defendants, seems to be disputed. In *Fallis v. McArthur*, 1 Bond, 100, it was held that the plaintiff was entitled to such process. While Deady, J., in *Field v. Lownsdale*, 1 Deady, 288, seems to be of a different opinion. 5. It must be filed at the time the defendant, or defendants, enter their appearance in the state court. As to the meaning of the expression, "at the time of entering his appearance," consult *Chatham Nat. Bk. v. Merchants Nat. Bk.*, 1 Hun. (N.Y.) 702; *Davis v. Cook*, 9 Nev. 134; *Webster v. Crothers*, 1 Dill. C. C. 301. In California, and most of the "code states," a formal appearance is not necessary. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him: Cal. Code C. P., sec. 1014; see *Forbes v. Hyde*, 31 Cal. 346; *Dyer v. North*, 44 Id. 157; *Lyman v. Milton*, Id. 631; *Lander v. Fleming*, 47 Id. 614.

SECTION 639, SUBDIVISION 2.

8. Under this subdivision, which is substantially the act of July 27, 1866, 14 Stat. at Large, 306, the right is given to a part of the defendants to remove a cause under the conditions named. The case of aliens, under this subdivision, has been already noticed. Aside from aliens, a removal may be had, under this subdivision, when all the following conditions exist: 1. The plaintiff in the suit must be a citizen of the state in which the suit is brought; 2.

There must be more than one defendant, and one or more of the defendants must be a citizen of the state where the suit is brought, and one or more of them must be a citizen of another state; 3. The amount in controversy must exceed the sum or value of five hundred dollars, exclusive of costs; 4. The suit must, so far as it relates to the non-resident defendant, be for the purpose of restraining or enjoining him, or be one in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause; 5. The party entitled to a removal must apply for it "before the trial or final hearing of the cause," in the state court. Only that part of the case which relates to the non-resident defendant thus applying is removed, leaving the case, as between the plaintiff and the resident defendant, to proceed in the state court. For the construction and the extent to which the act of 1866 will be applied, see *Hodgkins v. Hayes*, 9 Abb. Pr. (N. S.) 87; *Darst v. Bates*, 51 Ill. 439; *Stewart v. Mordecai*, 40 Ga. 1. This act has no application to a case where one of the defendants is an alien, and the other defendants are citizens of another state, and none of the defendants, or none who are served, are citizens of the state in which the suit is brought: *Davis v. Cook*, 9 Nev. 134. Under a joint application by two defendants, the removal may be granted as to one and denied as to the other: *Dart v. Walker*, 4 Daly (N. Y.) 188. Under special circumstances one copartner may remove the cause as to himself under the act of 1866: *McGinity v. White*, 3 Dillon C. C. 350. As to the construction of this subdivision in regard to cases where there can be a final determination of the controversy as to the defendant removing the cause, consult *Field v. Lownsdale*, 1 Deady, 288; *Field v. Lamb*, Id. 430; *Allen v. Ryerson*, 2 Dillon C. C. 501; *Bixby v. Couse*, 8 Blatchf. 73; *Case of Sewing Machine Companies*, 18 Wall. 583; S. C., 110 Mass. 70.

SECTION 639, SUBDIVISION 3.

9. This subdivision, as already stated, is substantially the act of March 2, 1867, known as the "prejudice, or local influence act." Like the act of 1866, the primary condition is the existence of a suit in a state court between a citizen of

the state in which the suit is brought and a citizen of another state, but unlike that act the right to remove the cause is given to the plaintiff, as well as the defendant, if an affidavit is made and filed of "prejudice or local influence." The time of making the application is not limited to the time of the "appearance" or answer, but may be made at any time before the trial or final hearing. In *Johnson v. Monell*, 1 Woolw. 394, Miller, J., says of the act of March 2, 1867. "For the first time, it allows a plaintiff to remove the suit from the tribunal of his own selection. It also allows this to be done either by plaintiff or defendant, in a certain event, in any stage of the litigation prior to the final hearing or trial. The only conditions necessary to the exercise of the right of removal are: 1. That the controversy shall be between a citizen of the state in which the suit is brought, and a citizen of another state; 2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs; 3. That the party, citizen of such other state, shall file an affidavit stating that he believes, and has reason to believe, that, from prejudice or local influence, he will not be able to obtain justice in the state court; 4. That he give the requisite surety for appearing in the federal court at the proper time, with copies of the papers. Congress intended to give the right in every case where the four requisites we have mentioned exist."

The right of removal under this act is limited to citizens, and does not apply to aliens: *Crane v. Reeder*, 28 Mich. 527; *Davis v. Cook*, 9 Nev. 134. The whole suit is to be removed: *Sewing Machine Co.'s Case*, 18 Wall. 553; *Cooke v. State Nat. Bk.*, 52 N. Y. 96; and all the defendants, not nominal or merely formal parties, must apply: *Bixby v. Couse*, 8 Blatchf. 73; *Cooke v. State Nat. Bk.*, *supra*. So, as to plaintiffs: 1 Dillon C. C., 299; 43 Ga. 181; 67 N. C. 391. As to the policy and purpose of the acts of 1866 and 1867, see *Crane v. Reeder*, *supra*; *Galpin v. Critchlow*, 112 Mass. 339; *Hazard v. Durand*, 9 R. I. 602; *Fisk v. U. P. R. R. Co.*, 6 Blatchf. 362.

ACT OF MARCH 3, 1875.

10. The important parts of this act have been given. For the entire act, see 18 U. S. Stats. at Large, 470. It is not material in this connection to note the first section of the

act relating to the original jurisdiction of the circuit court, further than to say it gives jurisdiction in certain cases on the ground of the subject-matter, without regard to the citizenship of the parties, and in other cases because of citizenship without regard to the subject-matter of the suit; and the same distinctive points are carried into the second and third sections in regard to removal of causes; and therefore it may be stated, as a general proposition, that any cause which might, under this act, have been originally brought in the circuit court, may be removed from a state court at the time and in the manner prescribed in the third section. Briefly stated, the conditions of removal are the following: 1. The amount in controversy must exceed five hundred dollars, exclusive of costs; 2. The right of removal is given to either party, and, under special circumstances, to either one or more of either plaintiffs or defendants, viz.: Where in any suit mentioned in section 2 there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove the cause; 3. As to subject-matter, without regard to citizenship, it gives the right to remove "any suit of a civil nature at law or in equity" involving over five hundred dollars, (1) in cases arising under the constitution, or laws or treaties of the United States, and (2) cases in which the United States shall be plaintiff or petitioner; 4. As to citizenship, without regard to subject-matter, the right of removal is given, (1) in any suit in which there shall be a controversy between citizens of different states; or, (2) a controversy between citizens of the same state claiming lands under grants of different states; or, (3) a controversy between citizens of a state and foreign states, citizens, or subjects; 5. The removal must be applied for by petition filed in the state court "before or at the term at which the cause could be first tried, and before the trial thereof."

The question as to what are cases "arising under the constitution and laws of the United States," has received judicial construction. In *Cohens v. Virginia*, 6 Wheat. 379, it is said that "a case may be truly said to arise under the constitution or a law of the United States, whenever its cor-

rect decision depends upon a right construction of either." In *The Mayor v. Cooper*, 6 Wall. 252, Swayne, J., said: "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." If the actual controversy involves only questions of common law or of state statutes, though the right or title of one of the parties was originally derived or acquired from or under an act of congress, there being no question raised as to the construction or validity of the act, the case is not removable: See *McStay v. Friedman*, 92 U. S. (2 Otto) 723; *Romie v. Casanova*, 91 Id. (1 Otto) 380; *Trafton v. Nouges*, (Sawyer, Circuit Judge) 13 Pacific Law Rep. 49; S. C. 4 Cent. L. J. 228.

In law cases removed to the federal court, or in purely equity cases it is not necessary to replead, even for the purpose of showing jurisdiction, as the order for removal becomes part of the record, and shows how the jurisdiction is acquired. In cases, however, where legal and equitable claims or causes, or causes of action are joined, as in those states having codes, it is necessary to frame the pleadings anew, making the case one at law or one in equity, or dividing it, and making one a case at law, and the other a suit in equity: see Rev. Stats., secs. 639, 914; *Thompson v. Railroad Co.*, 6 Wall. 134; *Dart v. McKinney*, 9 Blatchf. 359; *Green v. Custard*, 23 How. (U. S.) 484; *Partridge v. Ins. Co.*, 15 Wall. 573.

WHEN THE APPLICATION FOR REMOVAL MUST BE MADE.

11. Under subdivision 1 of sec. 639, the application must be made by the defendant at the time of entering his appearance in the state court. He must act promptly. If he pleads, demurs, or answers, he waives his right: *Johnson v. Monell*, 1 Woolw. 390; *West v. Aurora City*, 6 Wall. 139; *Webster v. Crothers*, 1 Dillon C. C. 301; *McBratney v. Usher*, Id. 367, 369. It is too late after reference and continuance: *Robinson v. Potter*, 43 N. H. 188. Nor can the state court restore the right of removal by permitting an appearance to be entered *nunc pro tunc*: *Ward v. Arredondo*, 1 Paine, 410; *Gibson v. Johnson*, Pet. C. C. 44. Under subdivisions 2 and 3 of the same section the petition for removal may be

filed "at any time before the trial or final hearing of the suit" in the state court. It is too late to make it after the case has been appealed and is pending in the state appellate court. It must be made before final judgment in the court of original jurisdiction: *Stevenson v. Williams*, 19 Wall. 572; *Vaunevar v. Bryant*, 21 Id. 41; *Fasnacht v. Frank*, 23 Id. 416. In *Rathbone Oil Co. v. Rauch*, 5 West Va. 79, a case was commenced against a citizen of another state, for unlawful detainer, before a justice of the peace; judgment was rendered for the plaintiff, and defendant appealed to the (state) circuit court, and in that court made his application to remove the cause to the federal court under the act of 1867, which was denied. On appeal to the court of appeals the latter court reversed the judgment, holding: first, that no motion to remove could have been made before the justice, that not being a "state court" within the meaning of the act of congress; second, the case on appeal from the justice is tried *de novo* in the circuit court, the same as if never tried, and hence there was no "final trial" within the intent of the act. It seems now to be generally held that the fact of a trial, if the verdict has been wholly set aside and a new trial granted by the court in which the action was brought, or if the judgment of that court has been wholly reversed by the state appellate court and the cause has been remanded for a new trial, that the application for removal may be made: see *Vaunevar v. Bryant*, 21 Wall. 41; S. C. 106 Mass. 180; *Kellogg v. Hughes*, 3 Dillon, 357; *Dart v. McKinney*, 9 Blatchf. 359; *Fasnacht v. Frank*, 23 Wall. 416; *Dart v. Walker*, 4 Daly (N. Y.), 188; *Insurance Co. v. Dunn*, 19 Wall. 214.

12. The act of 1875 requires the petition for removal to be filed before or at the term at which the cause could be first tried. This is construed to mean the first term at which, under the law and the rules of the court, the cause would be triable, whether from press of business or otherwise it could be reached for trial at that term or not: see *Ames v. Colorado Central R. R. Co.* 4 Cent. L. J. 199. Whether laches in making up the issues will defeat the right of removal, if removal be applied for before the issues are completed: *quere?* *Scott et al. v. Clinton and Springfield R. R. Co.*, 8 Chicago Legal News, 210; S. C., 6 Bissell, 529.

*No. 831.**Entry of Appearance.*

[TITLE OF STATE COURT AND CAUSE.]

The said defendant, A. B., now comes, and by C. D., his attorney, enters his appearance in said action, and herewith, also, files his petition for the removal of said cause into the Circuit Court of the United States, in and for the District of the State of

C. D.,

Attorney for Defendant.

*No. 832.**Petition for Transfer Under Subd. 1, Sec. 639.*

In the District Court of the Judicial District of the State of California, in and for the County of

A. B., Plaintiff,	}	Petition for Transfer to Federal Court.
<i>against</i>		
C. L., Defendant.		

To said District Court:

Your petitioner, C. L., respectfully shows that he is the defendant in the above-entitled suit; that said suit was brought by the said plaintiff, A. B., on or about the day of, 187..., in this Court; that the said plaintiff at the time of the commencement of said suit was, and still is a citizen of this State, and your petitioner then was and still is a citizen of the State of

Your petitioner further represents that said action above-entitled, was brought by the said plaintiff for the purpose of [here briefly state the nature and subject-matter of the suit, and the relief asked] and that the matter in dispute in said action exceeds the sum and value of five hundred dollars, exclusive of costs.

Your petitioner further shows that he has herewith filed his appearance in said action, and offers herewith his bond executed by, of, as surety, in the penal sum of two hundred and fifty dollars, conditioned as required by Section 639 of the Revised Statutes of the United States, and that your petitioner desires to remove said cause above-entitled into the Circuit Court of the United States for the District of pursuant to said Statute.

Your petitioner, therefore, prays that said bond may be accepted as good and sufficient, according to said Statute, and that the said suit may be removed into the next Circuit

Court of the United States in and for said District of, pursuant to said Statute in such case made and provided, and that no further proceedings be had therein in this Court.

And your petitioner will ever pray.

.,
Attorney for Plaintiff.

State of, }
County of, } ss.

C. L., being first duly sworn, says that he is the petitioner above-named, that he has read the foregoing petition and knows the contents thereof, and that each and every of the matters and things therein stated are true.

[JURAT.]

[SIGNATURE.]

1. *Affidavit*.—The statute does not expressly require the petition to be verified, nor that any affidavit should be filed, though the usual practice, and certainly the better practice, is to verify the petition. If the suit is for a money demand, the declaration or complaint of the plaintiff and the statement in the verified petition for removal would be ordinarily sufficient to satisfy the court as to the amount or value in dispute, but where the suit is not upon a money demand, or for damages, the better course would be to present a distinct affidavit of value.

No. 833.

Same—On Ground of Prejudice or Local Influence.

[TITLE AS IN No. 832.]

To said District Court—Your petitioner, A. B., respectfully shows that he is the plaintiff in the above-entitled suit, and that the same was commenced by him on or about the . . . day of, 187., in said District Court, and that your petitioner was at the time said suit was brought, and still is, a citizen of the State of, and a resident thereof.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said defendant, who is a citizen of the State of and a resident thereof; that said action was brought by your petitioner for the purpose of [here briefly state the nature of the suit and the relief asked], and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that said suit has not been tried, but is now pending for trial in this court, and that your petitioner desires to remove the same into the

Circuit Court of the United States for the District of ,
in pursuance of the act of Congress in that behalf pro-
vided; to wit, the Revised Statutes of the United States,
section 639, subdivision 3.

Your petitioner further says that he has filed the affidavit
required by the statute aforesaid in such cases, and offers
herewith his bond, executed by , of ,
as surety, in the penal sum of two hundred and fifty dollars,
conditioned as by said act of Congress required.

[Add prayer as in form No. 832.]

[VERIFICATION.]

.....
Attorney for Plaintiff.

No. 834.

Affidavit of Prejudice or Local Influence to accompany the foregoing Petition.

[TITLE OF COURT AND CAUSE AS IN NO. 832.]

State of } ss.
County of }

I, A. B., being duly sworn, say that I am the plaintiff
in the above-entitled cause, and that I have reason to be-
lieve, and do believe, that from prejudice and local influence
I will not be able to obtain justice in said State Court.

[JURAT.]

[SIGNATURE]

2. Form.—The above form of petition and affidavit are from “Dillon on
the Removal of Causes,” pp. 81, 82, under subdivision 3 of sec. 639, and may
be readily changed to apply to the case of a defendant applying on the same
ground.

No. 835.

Bond to Accompany last Petition above.

Know all men by these presents that we as
principal, and of as surety, are hereby
held and firmly bound unto in the penal sum of
. dollars, lawful money of the United States, for
the payment of which, well and truly to be made, we bind
ourselves jointly and severally firmly by these presents.
The condition of this obligation is such, that if said
shall enter and file, or cause to be entered and filed, in
the Circuit Court of the United States in and for the
. District of , on the first day of its session
next to be held, copies of all process, pleadings, depositions,
testimony and other proceedings in a certain suit or action
now pending in the District Court of the Judicial
District of the State of , in which

is plaintiff and.....is defendant; and shall do such other appropriate acts as, by the act of Congress, in that behalf are required to be done upon the removal of such suit from said State Court into the said United States Court, then this obligation shall be void, otherwise of force.

Dated this day of, 187.

.....

State of..... }
 County of..... } ss.

I,, of said County, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of....., and a property-holder therein; that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property by law exempt from execution; and that I have property in the State of....., liable to execution, of the value of more than five hundred dollars.

[JURAT.]

[SIGNATURE.]

3. Form.—The above form of bond is applicable to removals under subdivision 1 of sec. 639, as well as under subdivision 3. If the bond is given under subdivision 2, the condition should be to enter and file, etc., “copies of all process, pleadings, depositions, testimony, and other proceedings, so far as the same concern or affect the petitioner, in a certain suit,” etc.

No. 836.

Form of Petition for Removal under Act of March 3, 1875, on the ground of Citizenship, where all the Opposing Parties are Citizens of Different States, and all the Plaintiffs, or all the Defendants, unite in the Petition.

[TITLE as in No. 832.]

To said Court: Your petitioners, A. B., C. D., and E. F., respectfully show to this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States; that, at the time of the commencement of this suit, the said A. B., one of your petitioners, was, and still is, a citizen of the State of.....; that said C. D. was then, and still is, a citizen of the State of.....
 [Here give, in the same manner, the citizenship of each of the several plaintiffs and defendants.]*

And your petitioners offer herewith a bond, with good

and sufficient surety, for their entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for the payment of all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this Honorable Court to proceed no further in said cause, except to make the order of removal now prayed for and required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said Circuit Court of the United States in and for the District of....., and your petitioners will ever pray.

Attorney for Petitioners.

[VERIFICATION.]

4. FORM.—If the application is made under the latter clause of section 2, Act of 1875, and all the plaintiffs, or all the defendants, as the case may be, do not join in the petition for removal, follow the preceding form down to the star (*), changing the plural to the singular if required, and then insert: “Your petitioner states that, in the said suit above-mentioned, there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit: a controversy between the said petitioner and the said.....and the said[naming the parties actually interested in said controversy.]” If the pleadings in the case do not sufficiently show the nature of the controversy to be one within the latter clause of section 2, an explicit statement showing that fact should be added to the above allegations, and then proceed as in the above form.

Where the ground of removal is that the suit is one “arising under the constitution and laws of the United States, or treaties made under their authority,” follow the above form down to the star (*), and then insert the following: “Your petitioner further shows that said suit is one arising under the laws [or constitution, or treaties, as the case may be] of the United States, in this: [Here state the facts showing that a Federal question necessary to a proper decision of the case is involved], after which follow above form to the conclusion. In this case the citizenship of the

parties is not necessary to be stated, but such statement can do no harm; and if it constitutes an additional ground for removal, it may be also relied upon.

No. 837.

Bond to Accompany the Preceding Petition.

[Follow No. 835 down to the beginning of the condition, then proceed as follows:]

This obligation is upon the following conditions: The saidhaving petitioned the.....Court of theJudicial District of the State of....., for the removal of a certain cause therein pending, wherein..... is plaintiff, and.....is defendant, to the Circuit Court of the United States in and for the District of.....

Now if the said....., your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be adjudged against him by said Circuit Court, if said Court shall determine that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force.

Witness our hands and seals this.....day of...., 187...

[SIGNATURES AND SEALS.]

[JUSTIFICATION OF SURETIES.]

5. Form.—In any case where special bail was required of the defendant in the cause originally, insert in the condition of the bond, “and shall then and there appear and enter special bail in said action.”

6. Amount of Bond.—The sum to be inserted as the penalty of the bond is not prescribed. The amount should be fixed with reference to the circumstances of the case, and the acts and duties of the petitioners in each special case.

7. Essentials of Bond.—It is essential that the bond be several, not merely joint: *Roberts v. Canington*, 2 Hall, 640. It is not essential that the petitioner should be one of the obligors in the bond: *Vandervoort v. Palmer*, 4 Duer, 677. The bond need not be conditioned for the appearance of other defendants who had not been served with process, and who do not unite in the application: *Suydam v. Smith*, 1 Den. 263; *Vandervoort v. Palmer*, 4 Duer, 677.

8. Offer and Service of Bond.—A sufficient bond must be offered at the time pointed out in the act, and cannot be afterwards amended in substance: *Roberts v. Canington*, 2 Hall, 640.

*No. 838.**Notice of Motion for Removal.*

[TITLE.]

To, plaintiff's attorney:

Take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were on, etc. [or upon the petition, a copy of which is hereto annexed, and which, together with the petitioner's appearance herein already served on you, was, on, etc.], filed in this Court, and upon the bond of the petitioner and his sureties [or the bond on behalf of the petitioner], a copy of which is also annexed, defendant will, on, at, at the hour of, move the Court that said cause be removed from this Court to the Circuit Court of the United States for the District of

9. Opposing Motion.—The plaintiffs may oppose the motion upon the moving papers, or with new affidavits also, but after the order granting the petition has been made the jurisdiction of the state court is gone, and that court has no power to vacate its order: *Livermore v. Jenks*, 11 How. Pr. 479.

10. Notice.—The application should be on notice, or an order to show cause: *Disbrow v. Driggs*, 8 Abb. Pr. 305 n. But compare *Illius v. New York and New Haven R. R. Co.*, 13 N. Y. 597, where an order was made *ex parte*.

*No. 839.**Order to Show Cause.*

[TITLE.]

To, plaintiff's attorney:

The defendant having this day entered an appearance in this cause, and at the same time filed a petition praying for the removal of this action to the Circuit Court of the United States for the District of California, pursuant to the Act of Congress of the United States in such case made and provided, and offered the surety as therein provided by a bond now filed, it is ordered that the plaintiff show cause on, the day of next, before this Court, at the opening of Court on that day, or as soon thereafter as practicable, why the prayer of said petition should not be granted, and in the meantime and until the hearing of said petition, let all proceedings on the part of the plaintiff herein be stayed.

E. D.,

District Judge.

[DATE.]

No. 840.

Order for Removal of Cause to United States Court.

[TITLE.]

Upon reading and filing the petition of John Smith, the defendant in the above-entitled action, and upon filing the bond, and good and sufficient sureties having been offered by the said defendant in the premises, and the same being by me, the Judge of said District Court duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the Circuit Court of the United States for the District of California, to be held in and for the District of California, be, and the same is hereby allowed and ordered, in accordance with the aforesaid petition, and the statute of the United States in such case made and provided.

[DATE.]

[SIGNATURE.]

11. Injunction, Effect on.—Neither an outstanding injunction, nor a motion for an attachment for its violation, prevents the removal of the cause: *Byam v. Stevens*, 4 Edw. 119. Injunctions, orders, and other proceedings granted in the state court prior to removal, are expressly continued in force by section 4 of the act of March 3, 1875, 18 U. S. Stats. at Large, 71. In *Carrington v. Florida R. R. Co.*, 9 Blatchf. 468, it was held that where the motion to dissolve an injunction in the federal court is made upon the same papers upon which the writ was granted in the state court, it is in effect an application for reargument, and leave to make such motion should be first applied for and obtained before it can be made.

12. Mandamus.—The supreme court of California has no jurisdiction to grant a writ of mandate to compel the judge of a district court to proceed with the trial of an action commenced therein, in which an order has been made by said district court, directing the cause to be transferred to the circuit court of the United States for trial, for the alleged reason that the parties thereto are citizens of different states: *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283; the subject-matter being in the jurisdiction of the said district court.

13. Removal Refused.—A suit in equity to enjoin a suit at law is in reality an equitable defense, and its removal may be refused: *Rogers v. Rogers*, 1 Paige, 183. A summons to show cause why a debtor, not served in the original action, should not be bound by the judgment, is regarded as a further proceeding rather than a new action, and a removal cannot be granted unless the plaintiff is an alien, or all of the several defendants are citizens of another state from the plaintiff: *Fairchild v. Durand*, 8 Abb. Pr. 305; see Brightly's Digest, 12.

14. Surety Approved.—It is proper that the order should declare the surety approved: *Vandevoort v. Palmer*, 4 Duer, 677.

15. Signature and Verification.—The petition may be signed by the defendant's attorney, and may be verified by his agent in fact: *Vandervoort v. Palmer*, 4 Duer, 677.

No. 841.

*Form of Writ of Certiorari under Section 7 of the Act of March 3, 1875,
18 U. S. Stats. at Large, 472.*

The President of the United States of America to the Judge of the District Court of the Judicial District, in and for the State of California:

Whereas it hath been represented to the Circuit Court of the United States for the District of, that a certain suit was commenced in the [here name the State Court] wherein, a citizen of the State of was plaintiff, and, a citizen of the State of, was defendant, and that the said duly filed in the said State Court his petition for the removal of said cause into the said Circuit Court of the United States, and filed with said petition the bond with surety required by the act of Congress of March 3, 1875, entitled "An act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes," and that the clerk of the said State Court above-named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner;

You, therefore, are hereby commanded that you forthwith certify, or cause to be certified, to the said Circuit Court of the United States for the District of, a full, true and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said Circuit Court may be able to proceed thereon, and do what shall appear to them of right ought to be done. Herein fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, and the seal of said Circuit Court hereto affixed, this, the day of, A. D. 187.

.....,

[SEAL.]

Clerk of said Circuit Court.

16. **Writ.**—"The writ of *certiorari* should be addressed to the judge or judges of the state court, but a return to the writ duly certified may be made, it is supposed, by the clerk of the state court: Dillon on Removal of Causes, 88; citing *Stewart v. Ingle*, 9 Wheat. 526.

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